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**Counseling the Putative Father:
A Legal Assistance Overview to
Disputed Paternity**

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I. Introduction

The incidence of pregnancies outside of marriage, within both the military and civilian communities, is alarmingly high.¹ This, coupled with the increasingly aggressive posture of state agencies in litigating paternity when an unwed mother is receiving or is a potential recipient of public assistance means that the legal assistance officer can

¹In *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 Fam. L.Q. 247, 249 (1976), the authors observed that:

[D]espite declining birth rates, the problem of illegitimacy remains at the level of a national crisis. The ten years from 1961 to 1970 saw enough new illegitimate children to populate a city the size of Los Angeles; the last five years, a city the size of Detroit. More than three hundred and ninety-eight thousand illegitimate children were added in 1970, 360,000 in 1969, 339,000 in 1968, 318,100 in 1967, 302,000 in 1966, for a total exceeding 1,700,000 in just these five years. Moreover, not only has there been an increase in the absolute number of illegitimate births, but the rate has been accelerating and now exceeds ten percent of all births. In many urban areas illegitimacy stands at forty percent and in some it exceeds fifty percent.



REPLY TO
ATTENTION OF

DAJA-ZA

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310

9 September 1982

SUBJECT: DA Mandated Training for JAGC Personnel - Policy Letter 82-6

ALL COMMAND AND STAFF JUDGE ADVOCATES

1. It is my policy that all members of the Judge Advocate General's Corps comply with Department of the Army mandated training and testing.
2. For most judge advocate activities, meeting training requirements is relatively easy. However, members of the Trial Defense Service and the Trial Judiciary face unique problems because of the nature of their attachment to installations and organizations. Whenever possible, military judges and defense counsel should participate with the local Staff Judge Advocate office in military training and testing. I particularly encourage joint training and testing for physical training, weapons qualification, and NBC training.
3. Staff Judge Advocates should insure that judges and defense counsel receive sufficient advance notice of training dates so that dockets and travel can be planned to permit maximum participation in the training. Additionally, Staff Judge Advocates should, when needed, assist these officers in obtaining equipment required for the training.
4. The primary responsibility for satisfying training requirements rests with the individual. However, I expect Staff Judge Advocates to assist all JAGC personnel assigned to and satellited on their offices in meeting these requirements. It remains the responsibility of the chain of command of the Trial Defense Service and Trial Judiciary to monitor compliance with training requirements for their personnel, while the Staff Judge Advocates are responsible for their assigned personnel.
5. Satisfaction of training requirements will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen
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expect to encounter a significant number of cases involving paternity. The purpose of this article is to provide a brief overview of the more common and important issues connected with counseling an alleged father in a paternity suit.³ Although the majority of legal assistance officers are not able to represent the servicemember in court, effective and complete counseling requires an understanding of the legal and medical issues discussed below.

II. The Rise of State-Initiated Paternity Suits

In recent years, the states have become increasingly active in the area of paternity litigation primarily as the result of federal legislation. In 1974, Congress enacted amendments dealing with child support and the establishment of paternity which became part D of title IV of the Social Security Act.⁴ These provisions require states to establish or designate an agency to obtain and enforce orders for support of children for whom application for Aid to Families with Dependent Children (AFDC) has been made and, if necessary, to initiate paternity proceedings. Should the state fail to comply with these requirements, certain penalty

provisions may apply.⁴ Individuals not receiving welfare are also entitled to the services relating to establishment of paternity and enforcement of support orders.⁵ These provisions are clearly a reaction to the increased number of illegitimate children receiving AFDC; taxpayers are being forced to support the children of natural fathers who are escaping their parental responsibilities.

An AFDC applicant's eligibility for assistance is conditioned upon cooperation with state authorities.⁶ The cooperation envisioned extends to naming the father if his identity is known, rendering assistance in locating him, and participating in the paternity action as necessary under local law. Should the AFDC applicant fail to cooperate, she will lose her share of the assistance payment. The child, however, will not be deprived of aid because of the mother's failure to cooperate.⁷

The Revised Uniform Enforcement of Support Act (RURESA) also contains a provision for the determination of paternity in a proceeding for child support under the original Uniform Enforcement

³When counseling the plaintiff-mother, the legal assistance officer should advise her concerning her right to file a paternity claim pursuant to Army regulations, see notes 10-19, *infra*, and encourage her to obtain a judicial decree of paternity in civil court.

⁴42 U.S.C. §§ 651-60 (1976).

⁴*Id.* at §§ 603(h), 652(a)(4).

⁵*Id.* at § 654(6). This legislation is designed to prevent these individuals from becoming public wards.

⁶42 U.S.C. 602(a)(26)(B) (1976); 45 C.F.R. 232.12 (1981). See *Coe v. Mathews*, 426 F.2d 774 (D.C. Cir. 1976).

⁷42 U.S.C. § 602(a)(26)(B)(ii) (1976); 45 C.F.R. § 232.12(d)(2) (1981).

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of Support Act (URESA).⁸ URESA was promulgated in 1950. Significant revision in 1968 led to what is known as RURESА. Both are primarily designed to foster cooperation among the states in enforcing paternal duties of support. RURESА provides that if the putative father defends a paternity suit on the ground that his parentage has not been established and the court determines that the defense is not frivolous, the court may adjudicate the paternity issue. Adjudication cannot take place, however, unless both parties are present at the hearing or the facts indicate that the presence of both parties is unnecessary. If the court determines that adjudication cannot go forward, the hearing will be adjourned until the paternity issue has been resolved in the proper forum. In those states which have not adopted RURESА, case law varies significantly on the issue of whether a determination of paternity can be made by a court in a child support proceeding under the applicable state URESА statute.⁹

III. Military Aspects of Paternity

One of the major concerns of a soldier involved in a paternity suit is what action his commander can take regarding the dispute and whether the suit will adversely affect his military career. These issues are addressed by Army regulation.¹⁰

A. AR 608-99

AR 608-99 provides the military procedures for resolving paternity claims against servicemembers when there is either an allegation of paternity or a

judicial order or decree of paternity.¹¹ The responsibility for processing paternity claims is placed on the immediate commander or the officer having general court-martial jurisdiction over the servicemember in question. Once an allegation of paternity is received, the immediate commander must interview the servicemember. Before the interview, the commander must apprise the servicemember of his Privacy Act rights and afford him an opportunity to consult with an attorney.¹² During the interview an effort should be made to determine whether the servicemember will admit or deny paternity and should be given the opportunity to voluntarily furnish a signed statement.¹³ The commander must further advise the soldier that failure to support his illegitimate child could cause his pay to be garnished and unfavorable information to be placed in his personnel records.

The commander also has the responsibility of replying to the complainant. Should the servicemember refuse to release the information to the complainant, the commander will respond that Army authorities are unable to do anything further without being furnished a court decree declaring the servicemember to be the father.¹⁴

If the servicemember makes a signed statement admitting paternity, the statement should indicate whether the individual is willing to marry the mother and has intentions of providing support. If the member is willing to marry or render support, the commander will keep the statement, will not disclose its contents to any one, and will ask the complainant to provide a written statement containing the pertinent facts. A signed verification

⁸See generally Comment, *Child Support Enforcement and Establishment of Paternity as Tools of Welfare Reform-Social Services Amendments of 1974*, pt. B, 42 U.S.C. §§ 651-60 (Supp. V., 1975), 52 Wash. L. Rev. 169 (1976); Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESА*, 18 J. Fam. L. 537 (1979-80).

⁹This is a matter beyond the scope of this article. For an extensive treatment of the issue see Annot., 81 A.L.R.3d 1177 §§ 3, 4 (1977).

¹⁰Army Reg. 608-99, Personal Affairs—Support of Dependents, Paternity Claims, and Related Adoption Proceedings, chs. 3, 4 (15 Jan. 1979) [hereinafter cited as the regulation]. For a limited discussion of the regulation, see (U.S. Dep't of the Army, Pamphlet No. 27-12, Legal Assistance Handbook ch. 23 (C3, 1 Apr. 1980).

¹¹The regulation, *supra* note 10, at para. 3-1(a).

¹²*Id.* at para. 3-2(a). Having advised the servicemember of his rights under the Privacy Act, the commander is required to have the soldier sign a statement prohibiting or authorizing release of the information to the complainant. This is to be done prior to making any admission or denial of paternity. *Id.* at para. 3-2(c). The appropriate Private Act disclosure is contained within the regulation at fig. 3-4.

¹³*Id.* at para. 3-2(a). If the member is suspected of an offense he must be advised of his rights under Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1976). This must be done prior to the time the statement is taken. The regulation, *supra* note 10, at para. 3-2(b).

¹⁴*Id.* at para. 3-2(d).

of pregnancy or a copy of the birth certificate should be included. If the servicemember had expressed a willingness to marry, then the complainant should be asked whether she is willing to marry him. If the member acknowledges paternity, but declines to marry or render support, the commander will advise the complainant that the Army cannot render any further assistance without a judicial finding that the member is the father.¹⁵

Where both the servicemember and the complainant execute statements indicating a willingness to marry, the servicemember will be granted ordinary leave so that the marriage can be accomplished. If the servicemember expresses a willingness to provide support, the commander must assist him in filing an allotment or establishing an alternative means of support. Matters concerning the amount of payment, the method to be employed and the date it will commence will be brought to the attention of the complainant.¹⁶

If the soldier denies paternity or refuses to admit paternity, the commander will advise the complainant of these matters if the servicemember has authorized release of this information. In addition, the complainant will be informed that the Army can take no further action unless a court order of paternity or support is furnished.¹⁷ If either exists, the commander must advise the soldier of his moral and legal obligation to provide support.¹⁸ When the commander determines that a servicemember has disregarded or failed to comply with the terms of a paternity judgment or has involved himself in a paternity matter so as to cast "serious doubt on his suitability for favorable personnel actions," the commander shall forward the entire file to the commander exercising general court-martial jurisdiction over the servicemember. If review by the command indicates that the obligations are valid and that the individual has "repeatedly failed to honor moral, legal, or financial obligations," the commander will sign an indorsement authorizing the matter to be placed in the soldier's

¹⁵*Id.* at para. 3-3.

¹⁶*Id.* at para. 3-4.

¹⁷*Id.* at para. 3-7.

¹⁸*Id.* at para. 3-8(a).

Official Military Personnel File and Military Personnel Records Jacket.¹⁹

B. Military Benefits

The parties to a paternity action should be aware of eligibility of an illegitimate child for military benefits. Historically, illegitimate children were routinely barred from receiving certain benefits. In recent years, the United States Supreme Court has addressed the issue of whether classifications predicated on illegitimacy violate the Equal Protection Clause of the Fourteenth Amendment. Although such classifications are not subject to strict scrutiny, they "are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interest".²⁰ Even though illegitimacy classifications may operate unfairly on some illegitimate children, the Court has stated that its "inquiry under the Equal Protection Clause does not focus on the abstract fairness of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."²¹

In response to these recent constitutional decisions, the Army now provides that a servicemember is entitled to receive basic allowance for quarters (BAQ) on behalf of an illegitimate child provided that he has been judicially decreed to be the father of the child, judicially ordered to pay child support, or if he has admitted parentage in writing. It must also be demonstrated that the child is in fact dependent on the servicemember.²² Once

¹⁹*Id.* at ch. 4.

²⁰*Lalli v. Lalli*, 439 U.S. 259, 265 (1978). See generally *Mathews v. Lucas*, 427 U.S. 495 (1976) (Court upheld a Social Security Act provision governing surviving children's insurance benefits under which illegitimate children were not entitled to certain procedural presumptions, thereby making proof of entitlement more difficult); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (Court struck down a statute depriving dependent illegitimate children of benefits under the state's workmen's compensation law). See also *Trimble v. Gordon*, 430 U.S. 762 (1977); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

²¹439 U.S. at 273.

²²Dep't of Defense, Military Pay and Allowances Entitlements Manual sec. 30238 (C66, 9 Dec. 1981).

dependency has been established, the illegitimate child is placed on an equal footing with other dependents regarding entitlement to all military benefits.²³

IV. Litigating Paternity

Once the paternity suit has been initiated, the legal assistance officer providing legal advice, or representing the putative father in court, must be familiar with a wide range of legal subjects. The issues of presumption of legitimacy, duration of the pregnancy, the impact of death of one of the parties, and blood testing loom large in many paternity cases.

A. Presumption of Legitimacy

Underlying many issues of paternity litigation is the doctrine of the presumption of legitimacy. This doctrine provides that a child born to a married woman living with her husband, who is not impotent, is conclusively presumed to be legitimate. The presumption exists for strong social policy reasons; it is designed to protect innocent children from the stigma of illegitimacy. The presumption may come into play in common factual situations. For example, a married woman may sue a man, not her husband, alleging that he is the father of her child. If the suit is successful, the child will be declared illegitimate. Consequently, it is incumbent upon the person seeking to prove illegitimacy to rebut this substantial presumption. Some states have codified the doctrine; in other states, the courts have judicially recognized it.²⁴

The presumption has strong roots in early common law. At that time, because of the severe stigma of illegitimacy, the presumption was applied regardless of whether logic was offended. For instance, at early common law, if a wife gave birth

to a child and her husband was within the four seas, i.e., within the jurisdiction of the King of England, the presumption was applied unless it could be shown that the husband was impotent.²⁵ In recent times the presumption has been relaxed to the degree that it is generally rebuttable. The jurisdictions vary markedly, however, on the degree of proof required to rebut it.

As a general rule, the presumption can be rebutted if it is shown that the husband was impotent, was absent at the time of conception, was sterile, or did not have sexual intercourse with his wife around the time of conception. The statutes are frequently silent as to the kind of evidence that can rebut the presumption. In *Hughes v. Hughes*,²⁶ the court addressed the issue of whether sterility of the husband would provide sufficient rebuttal evidence. The wife was suing a man, not her husband, for the support of her child. At trial, evidence was adduced that her husband had undergone a vasectomy which made procreation impossible. The defendant argued that the husband is to be conclusively presumed to be the father unless impotency is proven. The court rejected this argument and held that "where sterility is capable of definite determination, the conclusive presumption of legitimacy which is a substitute for such determination is not properly applicable."²⁷

A blood test, in some cases, can also satisfactorily rebut the presumption of legitimacy. In *Schulze v. Schulze*,²⁸ the plaintiff wife and her husband had been living apart for one year prior to the birth of the child. A blood test was conducted which unequivocally excluded the husband from paternity. The court ruled that the presumption of legitimacy was overcome both because of the blood test results and the husband's testimony that he did not have sexual intercourse with his wife during the crucial period. The Uniform Act on Blood Tests²⁹ supports this view: "The presumption of legitimacy of a child born during wedlock is over-

²³See Army Reg. No. 640-3, Personnel Records and Identification of Individuals—Identification Cards, Tags, and Badges, para. 3-3(c) (15 Jun. 1980). See also Army Reg. No. 40-3, Medical Services—Medical, Dental, and Veterinary Care, (101, 2 Apr. 1982); Army Reg. No. 40-121, Medical Services—Medical Services Uniform Services Health Benefits Program, (C4, 27 Sept. 1975) (medical benefits); Army Reg. No. 60-20, Army and Air Force Exchange Service—Exchange Services Operating Policies, (C1, 15 Feb. 1980) (PX and theater privileges).

²⁴10 Am. Jur. 2d, *Bastards* § 11 (1963).

²⁵*Id.*

²⁶125 Cal. App. 2d 781, 271 P.2d 172 (1954).

²⁷*Id.* at 784, 271 P.2d at 175.

²⁸35 N.Y.S.2d 218 (Sup. Ct. Monroe County 1942).

²⁹Uniform Act on Blood Tests to Determine Paternity (1973).

come if the Court finds that the conclusion of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child."³⁰

As noted above, there is a marked difference on the degree of proof various states require to rebut the presumption of legitimacy of a child born to a lawfully married woman. Reasons of social policy govern; the more difficult it is to rebut the presumption, the more difficult is to prove that a child is illegitimate. Arizona, for example, requires that the party opposing the presumption rebut it by clear and convincing evidence. In *State v. Mejia*,³¹ the prosecutrix testified that she had not seen her husband in years and that the defendant was the father of her child. Based on her testimony, the trial court found against the defendant. On appeal the court noted that the majority of jurisdictions required clear and convincing evidence to rebut the presumption of legitimacy and proceeded to adopt that standard.³² This requires the state to prove by clear and convincing evidence that the husband of the prosecutrix did not have access to her at about the time of conception.

The case of *In re Aronson*³³ is illustrative of the motivating social policy reasons behind a statute requiring a high degree of proof to rebut the presumption. The governing statute in that case stated that the presumption of legitimacy would prevail unless the contrary was proved beyond a reasonable doubt. The Supreme Court of Wisconsin, in commenting on the statute, noted: "The conscience of society requires that an innocent child should not be branded with the social stigma of being illegitimate with any degree of proof less than that."³⁴

³⁰*Id.* at § 5.

³¹97 Ariz. 215, 399 P.2d 116 (1965).

³²The presumption of legitimacy has been codified in Arizona in Ariz. Rev. Stat. Ann. § 8-601 (Supp. 1981-82), which provides that "every child is the legitimate child of the natural parents and is entitled to support and education as if born in lawful wedlock."

³³263 Wis. 604, 58 N.W.2d 553 (1953).

³⁴*Id.* at 609, 58 N.W.2d at 558. The statute now requires "clear and satisfactory preponderance of the evidence to rebut the presumption of legitimacy." Wis. Stat. § 328.39(1)(A) (1981).

B. Duration of Pregnancy

During the representation of a putative father, the duration of the mother's pregnancy must be studied by counsel. At issue is whether a *certain* act of sex brought about the pregnancy. If the date of the sex act is uncontroverted, the length of the pregnancy may exculpate the putative father.³⁵ The period of gestation is the time elapsed between the date of impregnation and the onset of labor; this averages approximately 280 days.³⁶

The importance of the gestation period is best illustrated by these hypothetical fact situations.³⁷ For example, plaintiff alleges that defendant engaged in sexual intercourse with her on one occasion. Between the date of the sex act, and the birth of the child, 271 days had elapsed. Clearly, 271 days is a normal gestation period. It is, nevertheless, incumbent upon defendant's attorney to ascertain the condition of the child at birth, i.e., whether the child was normal, premature, or postmature. If it is discovered that the child was born weighing three pounds and was clearly premature, the child is probably the product of a subsequent act of intercourse. Similarly, if the plaintiff charges that defendant is the father of a child born 15 July 1981 as a result of one act of intercourse that took place on 10 December 1980, the gestation period is 218 days. Unless the child was born premature, the defendant could not have been the father.

It should be noted that the presumption of legitimacy may play an important role in a case involving a child born to a married woman where the duration of the pregnancy appears to rule out the husband as the father. In *Lockwood v. Lockwood*,³⁸ the husband was shown to have been out of the country in military service from 24 April 1944 through 4 January 1945. The child was born 14 April 1945. Had the child been conceived on the last day on which the husband was in the country,

³⁵S. Schatkin, Disputed Paternity Proceedings § 25.01 (Supp. 1981) [hereinafter cited as Schatkin].

³⁶*Id.*

³⁷*Id.* at § 25.05.

³⁸62 N.Y.S.2d 910 (Sup. Ct. Spec. Term Queens County 1946); cited in Schatkin, *supra* note 35, at § 25.02.

the gestation period would be 355 days. Despite this powerful evidence indicating that the husband could not be the father, the court held that the presumption of legitimacy was not rebutted. The court was clearly more interested in saving the child from the stigma of illegitimacy than in ascertaining the identity of the true father.

C. Death of the Parties.

Another potential problem in paternity proceedings is the result produced when either the father, mother, or child dies. The general rule is that, absent a statute to the contrary, a bastardy proceeding will abate when the father dies.³⁹ When the putative father is deceased, two significant questions arise. The first is whether an obligation to support the illegitimate child can be imposed on the father's estate⁴⁰; this question is usually answered in the negative. This is the logical result when one considers that a father's obligation to support his legitimate issue ends upon his death. The second question is whether the illegitimate child can inherit through intestacy from the putative father. In *Weber v. Anderson*,⁴¹ the Supreme Court of Minnesota considered whether a paternity action survived the death of the putative father. The putative father died nine months after the birth of the child. The action was brought against the personal representative of the father's estate. The court noted that Minnesota's paternity statute did not contain express authorization allowing for the survival of a paternity action after the death of the putative father. The court opined, however, that even though the paternity statute was in derogation of the common law and would thus normally be strictly construed, it should instead be liberally interpreted to further serve its humanitarian and remedial purposes.⁴²

The court also noted that such an approach was consistent with recent constitutional decisions.⁴³ The risk of fraudulent claims against the decedent's estate was deemed a real one but "[t]he risk is outweighed by the injustice which is done to the innocent child by denying it an adjudication of paternity simply because its putative father happened to die".⁴⁴ Other courts have not gone so far. In *Carpenter v. Sylvester*,⁴⁵ a mother brought an action against the administratrix of the putative father's estate for determination of paternity and child support. The court noted that there was no statute containing a specific provision for survival of actions after the death of the putative father.⁴⁶ The plaintiff mother had argued that the State statute providing for the survival of actions generally governed the bastardy statute and therefore the action should be held to survive the putative father's death. The court rejected this argument, citing decisions in other jurisdictions which held the general survival statute inapplicable to bastardy proceedings. It should be noted that, even though inheritance was not an issue in the case, the court's holding impliedly decided the issue, because the inheritance issue is moot if one cannot bring a paternity proceeding.

If the illegitimate child dies during pendency of the proceeding, the general rule is that paternity proceedings against a putative father do not

³⁹*Id.* at 895. If the putative father is deceased and the action is held to abate, constitutional issues arise. The United States Supreme Court has addressed the question to what extent a state may restrict, through statutory classifications, the inheritance rights of illegitimate children. In *Lalli v. Lalli*, 439 U.S. 259 (1978), the Court examined a New York statute which provided that an illegitimate child could inherit from his father only if a court entered an order of filiation declaring paternity during the father's lifetime. It was noted that the statute made marriage of the parties irrelevant and that the statute was not designed to encourage legitimate family relationships. The Court primarily focused on the state's interest in the efficient administration of decedents' estates and the problems posed by paternal inheritance by illegitimate children. The Court held that the statute served those interests. The Supreme Court has consistently declined to subject illegitimacy classifications to strict scrutiny. Rather, the classifications must be substantially related to state interests.

⁴⁰*See* 269 N.W.2d at 895.

⁴¹269 So.2d 370 (Fla. Dist. Ct. App. 1972).

⁴²*Id.* at 371.

³⁹*See generally* 10 Am. Jur. 2d *Bastards* § 97 (1963).

⁴⁰*See* Annot., 58 A.L.R.3d § 188 (1974).

⁴¹269 N.W.2d 892 (Minn. 1978).

⁴²*Id.* at 894-95.

abate.⁴⁷ The theory is that certain expenses will be incurred by the mother even if the child is still-born and the proper person to bear these expenses is the true father. Liability, however, is not ongoing and is limited to expenses relating to the pregnancy.⁴⁸

An unusual New York case, *C v. L*,⁴⁹ is illustrative of this general rule. The petitioner in that case terminated her pregnancy by a therapeutic abortion. The issues presented to the court were whether the abortion terminated the action and whether the putative father would be pecuniarily liable for the costs of the abortion. The court first considered the nature of the filiation proceeding and concluded that, because bastardy proceedings are purely statutory and the statutes are remedial, they must be subject to liberal construction. The New York Rule was clear; if an illegitimate child died, the filiation proceedings did not necessarily abate. The court observed that the rationale employed by jurisdictions which deny recovery when the child dies is that bastardy statutes are designed to benefit the illegitimate child.⁵⁰ Noting that the applicable statute was silent on the issue, the court held that the rights of the mother had vested independently of the rights of the infant. Therefore, she was not divested of her rights solely because the pregnancy was terminated. The court concluded that costs attributable to the abortion were includable within the statutory definition and were to be borne by the father.

It is generally held that death of the mother of an illegitimate child will abate filiation proceedings, but state statutes must be consulted.⁵¹ For example, the controlling Arizona statute provides

"See 10 Am. Jur.2d *Bastards* § 96 (1963) and cases cited therein.

"In *Blackmon v. Brent*, 240 N.E.2d 255 (Ill. Ct. App. 1968), the putative father contended that it had not been sufficiently demonstrated that the children in question were born alive or dead. The court noted that, because the Paternity Act was non-punitive if an illegitimate child is born dead or subsequently dies, liability is not ongoing.

"61 Misc.2d 381, 305 N.Y.S.2d 69 (Fam. Ct. N.Y. County 1969).

"See generally *State v. Beatty*, 61 Iowa 307, 16 N.W. 149 (1883).

"See 10 Am. Jur.2d *Bastards* § 95 (1963).

that if the plaintiff in a paternity proceeding dies, abatement will not occur if the state is a party to the proceeding and the child is in its legal custody or if the child is the beneficiary of state or federal financial assistance.⁵²

D. Blood Testing

There is a revolution underway in the use of blood tests to determine paternity. The human leukocyte antigen (HLA) blood testing process⁵³ is so accurate that "many of the older rules of evidence for blood tests in disputed paternity cases now require complete revision".⁵⁴

Red blood cell testing to determine paternity was the state of the art as recently as five years ago.⁵⁵ Red blood cell grouping relies on a relatively small number of variables, such as classification of the blood into the four major blood groups, A, B, AB, and O; the three blood types, M, N and MN; and the slightly more complex Rh blood group system. In spite of such limitations, it is possible through the use of this test that a man may be conclusively excluded as the father. The proof that he might be the father, however, is very inconclusive at only about 60 percent accuracy.⁵⁶

HLA testing, by contrast, is much more complex and is replacing red blood cell analysis as the dominant form of testing. Although frequently termed a "blood test," the HLA test is rather a form of bio-

⁴⁷Ariz. Rev. Stat. Ann. § 12-845 (Supp. 1980-81).

⁴⁸There is an abundance of literature on the subject of HLA testing. Some of the more cited works are: H. Polesky, *Paternity Testing* (1976); Larson, *Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. Fam. L. 713 (1973); Lee, *Current Status of Paternity Testing*, 9 Fam. L.Q. 615 (1975); Polesky & Krause, *Blood Typing in Disputed Paternity Cases-Capabilities of American Laboratories*, 10 Fam. L.Q. 287 (1976); Sebring, Polesky, & Schanfield, *Gm and Km Allotypes in Disputed Parentage*, 71 Am. J. of Clinical Pathology (Mar. 1979); Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases not Excluded by ABO Testing*, 16 J. Fam. L. 543 (1978) [hereinafter cited as Terasaki].

⁴⁹Terasaki, *supra* note 53, at 543.

⁵⁰See discussion in *Commonwealth v. Blazo*, 406 N.E.2d 1323 (Mass. App. 1980).

⁵¹For a further explanation of red blood cell testing, see Schatkin, *supra* note 35, at §§ 5.01-7.07.

logical genetic testing. The basis of HLA testing involves the identification and typing of various antigens, i.e. a substance which can stimulate antibody production when introduced into another individual, found on the chromosomes in white blood cells. The specific location of the antigens on pairs of chromosomes serve as genetic markers which have been studied and catalogued. Since these various groupings are inherited, the antigen markers of the child and mother can be identified. The antigens which would have come from the father can be isolated, thereby identifying the father with a high degree of probability. The high probability of identification is due to the fact that only one in one thousand people have a similar HLA type.⁵⁷ When HLA testing is used in combination with the other blood tests, probability of paternity can be established with near absolute certainty.⁵⁸

The use of HLA testing is gaining judicial acceptance. In *Commissioner v. Blazo*,⁵⁹ the court was asked to decide whether the trial court abused its discretion in refusing to order HLA tests for the defendant, mother, and child. On appeal, the court held that no error had been committed, but based its ruling on the observation that the defendant's motion for an HLA test was considered and denied by the court in 1975, before publication of forensic literature evidencing the advisability of adding the HLA test to the more usual red blood cell tests. The court then stated, in dicta:

In view of the high level of accuracy now attained from the HLA test and its recognition and general acceptance by the scientific and medical community since the date of this trial, in any contested paternity case arising hereafter when the putative father requests the HLA test, the judge should carefully consider in the exercise of his or her sound dis-

cretion ordering the administration of the HLA test to the defendant, the mother and the child.⁶⁰

A related issue to the use of HLA testing is whether the results of such tests or any other of tests can be used as evidence of paternity or merely to exclude the defendant as father. Many states currently permit evidence of blood tests to prove parentage. A commonly worded statute provides that admission of evidence of possible paternity "is within the discretion of the court depending upon the infrequency of the blood type."⁶¹ Other statutes provide that "[e]vidence relating to paternity may include . . . [b]lood test results, weighed in accordance with evidence, if available, of the statistical probability of the father's paternity."⁶²

Few states have, as yet, followed Illinois in expressly recognizing the value of HLA testing. Illinois has changed its prior statute which had only allowed results to be received if definite exclusion was established.⁶³ The new statute provides that the parties may be required to submit to blood tests "including Human Leucocyte Antigen tests, to determine whether or not the man may be included or excluded as being the father of the child."⁶⁴

⁵⁷*Id.* at 1326.

⁵⁸See, e.g., Ky. Rev. Stat. § 406.111 (Supp. 1980); R.I. Gen. Laws § 15-8-14 (Supp. 1981); Utah Code Ann. § 78-45a-10 (Supp. 1981).

⁵⁹See, e.g., Colo. Rev. Stat. § 13-25-126 (Supp. 1981); Haw. Rev. Stat. § 584-12 (Supp. 1981); Nev. Rev. Stat. § 126.131 (Supp. 1981); Wash. Rev. Code Ann. § 26.26.110 (Supp. 1982). In ruling on the state's paternity statute, the Supreme Court of Colorado held that the right of a putative father to have blood tests conducted could not be made dependent upon his financial resources without violating the Equal Protection Clause of the Fourteenth Amendment:

Accordingly, the rule is made absolute, and the district court is directed to determine whether the petitioner is, in fact, indigent and unable to pay for blood grouping tests and, if so, to order the blood grouping tests be made at county expense.

Franklin v. District Court 194 Colo. 189, 191, 571 P.2d 1072, 1074 (1977).

⁶⁰1957 Ill. Laws, p. 1757. § 1.

⁶¹Ill. Rev. Stat. ch. 40, § 1401 (Supp. 1981-1982).

⁵⁷See note 53, *supra*, for a list of authorities providing a more complete explanation of HLA testing.

⁵⁸In *Pamala P. v. Frank S.*, 110 Misc.2d 978, 443 N.Y.S.2d 343 (Fam. Ct. N.Y. County 1981), HLA testing indicated that the probability of respondent's paternity was .997. *Id.* at 979 n.2, 443 N.Y.S.2d at 344 n.2. For a further discussion of this case, see text accompanying notes 105-115, *supra*.

⁶⁰406 N.E.2d 1323 (1980).

Several states, on the other hand, still provide for court ordered blood tests only to determine whether or not the defendant can be excluded as being the father. These states often emphasize that "the test results may be received in evidence only in cases where definite exclusion is established."⁶⁵ Merely because a statute appears to preclude the use of blood tests to prove paternity, however, does not necessarily mean that such evidence is inadmissible. In *Cramer v. Morrison*,⁶⁶ a California appellate court reviewed the propriety of the lower court's ruling excluding the results of an HLA paternity test because of the wording of California's statute concerning the admissibility of blood tests. The appellate court held that the lower court erred in granting the motion *in limine* to exclude the HLA tests. In examining the specific statute, the court noted that when the California legislature adopted the Uniform Act on Blood Tests to determine paternity, it omitted the section which allowed admission of the results of blood tests to show the possibility of paternity. The court stated that even if it were to accept the defendant's contention that the omission indicated a legislative intent to exclude blood test evidence to prove parentage, the legislature did not have in mind the more accurate HLA testing, since this type of testing was not generally known when the statute was adopted.⁶⁷ The court, therefore, held that HLA testing was admissible to prove paternity.

Based on the *Cramer* case, counsel should be prepared to argue that even if a statute prohibits consideration of blood tests to show parentage, the

statute does not necessarily apply to the more scientifically advanced genetic HLA testing.⁶⁸

HLA testing, however, has not met with universal acceptance. A hostile Utah Supreme Court held, in *Phillips v. Jackson*,⁶⁹ that a lower court erred in admitting the results of an HLA test. Although questioning the reliability and accuracy of HLA testing,⁷⁰ the Utah court primarily criticized the admission of the HLA test on the grounds that a proper foundation had not been established. The court proposed the following factors to be considered in laying a foundation for admissibility of HLA tests:

- (1). The correctness of the genetic principles underlying the test for determining paternity; (2) the accuracy and reliability of the methods utilized in application of the principle to determine paternity; (3) the effect of variables such as occur in persons of different nationalities or ethnic origins that would influence the accuracy of the test; (4) other factors that might tend to invalidate the test or significantly change the probability of accuracy; (5) establishing that the actual method employed and the particular test used in a given case were performed in accordance with proper procedures and with proper materials and equipment; and (6) the qualifications of the necessary witnesses.⁷¹

The *Phillips* case provides an excellent checklist of the items which must be established in order to admit or exclude evidence of HLA blood test results. In applying these factors, the court noted that "the laboratory technician who did the basic workup on the blood samples for the test was clearly not qualified to testify with respect to the basic validity of the tests."⁷² The technician did,

⁶⁵See, e.g., Ala. Code tit. 26, § 12(5) (Supp. 1981); Conn. Gen. Stat. § 46b-168 (Supp. 1981); D.C. Code § 16-2343 (Supp. 1981); Md. Fam. Law Code Ann. § 66G (Supp. 1981); Mass. Ann. Laws ch. 273, § 12A (Michie/Law. Co-op Supp. 1982); Mich. Stat. Ann. § 25.496 (Supp. 1981-82); Tenn. Code Ann. § 36-228 (Supp. 1981). See also Okla. Stat. Ann. tit. 10, § 504 (West Supp. 1981-82) ("Evidence showing the 'possibility' of paternity shall be inadmissible and the question of paternity shall be resolved on the basis of other evidence taken before the court.")

⁶⁶88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

⁶⁷*Id.* at 877, 153 Cal. Rptr. at 869.

⁶⁸See *Malvasi v. Malvasi*, 167 N.J. Super. 153, 401 A.2d 279 (1979); *Commissioner v. Lardeo*, 100 Misc.2d 220, 417 N.Y.S.2d 665 (Fam. Ct. Onondaga County 1979). But see *J.B. v. A.F.*, 92 Wis. 2d 696, 285 N.W.2d 880 (1979) (Wisconsin's court of appeals refused to admit results of HLA testing due to the strict wording of that state's statute).

⁶⁹615 P.2d 1228 (Utah 1980).

⁷⁰*Id.* at 1335 n.9.

⁷¹*Id.* at 1235.

⁷²*Id.* at 1236.

however, "testify to the necessary chain of custody of the blood samples and the actual use of the blood samples in performing the tests."⁷⁵ Moreover, the foundational information should have included the number and type of other blood and tissue tests and the cumulative effect of the additional tests on the predictive accuracy of the HLA test. Inquiry should also have been made into the effect, if any, of the racial or ethnic origins of the test subject. Additionally, the specific genetic markers relied upon should have been considered along with whether they were inherited from only one parent or both and the frequency with which they appear in the population at large. Finally, the court noted that the proponent of the admissibility of the tests must establish that "the sera used in the test and the sophistication of the laboratory are of the quality necessary to obtain the degree of reliability claimed."⁷⁴

A review of blood testing cases indicates that if such tests are going to be excluded from evidence, it will not be on the basis of the invalidity of the test but rather on the manner in which the tests were conducted.⁷⁶ Logically, counsel should not stipulate to the admissibility of the tests and should be prepared to engage in lengthy examination concerning the procedures employed.

E. Miscellaneous Evidentiary Issues

There are several other important evidentiary questions which invariably surface in a disputed paternity case. Many of such issues can have a significant impact on the outcome of the litigation. Some involve questions of defense or elements of proof of paternity and all must be placed in the context of the general rules of evidence applicable to any civil proceeding.

One of the more emotional evidentiary problems

⁷⁵*Id.*

⁷⁶*Id.* at 1237.

⁷⁷In *Anonymous v. Anonymous*, 10 Ariz. App. 496, 460 P.2d 32 (1969), the Arizona court of appeals granted relief to a party who had stipulated to the admissibility of blood test results, and remanded the case to establish whether the tests had been properly conducted. Although the testing in question was that of the older red blood cell analysis, the court's observations on the importance of a "properly conducted" test are instructive.

is the issue of the admissibility of evidence of sexual intercourse by the mother with men other than the defendant. Surprisingly, a rather clear rule has emerged. Such evidence is admissible upon the issue of paternity only when the sexual relations occurred during the period of possible conception of the child.⁷⁸ Conversely, as was noted by the court in *Comish v. Smith*,⁷⁷ to admit evidence to show the mother's general reputation for "sexual availability without specific reference to activities during the time period when conception was possible" or to introduce evidence "for the sole purpose of discrediting the [mother] by casting inferences of general immorality" would be error.⁷⁸

The rule limiting testimony of sexual relations of the mother with third persons has also found expression in many state statutes. For example, Hawaii, which has adopted the Uniform Parentage Act, provides that

[T]estimony relating to sexual access to the mother by an unidentified man at any time or by an identified man at a time other than the probable time of conception of the child shall be inadmissible in evidence, unless offered by the mother.⁷⁹

⁷⁸See generally *Pyeatte v. Pyeatte*, 21 Ariz. App. 448, 520 P.2d 542 (1974); *Gallina v. Antonelli*, 220 Cal. App. 2d 63, 33 Cal. Rptr. 570 (1963); *Huntington v. Crowley*, 51 Cal. Rptr. 254, 414 P.2d 382 (1966). In *Huntington*, the court noted that the law therefore allows the defendant to introduce evidence that the mother had sexual intercourse with another man or other men during the period in which, in the ordinary course of nature, the child must have been conceived.

Id. at 258, 414 P.2d at 386-7 (citations omitted). See also 10 Am. Jur. *Bastards* § 116 (1963) and cases cited therein.

⁷⁹77 Idaho 89, 540 P.2d 274 (1975).

⁸⁰*Id.* at 92, 540 P.2d at 277.

⁸¹Haw. Rev. Stat. § 584-14(b) (Supp. 1981). The impact of testimony relating to acts of sexual intercourse by the plaintiff with men other than the defendant can be very significant. In *Lupton v. Dep't of Health & Rehab. Serv.*, 379 So. 2d 692 (Fla. Dist. Ct. App. 1980), the court held that where the mother admitted having intercourse with another man, in addition to the putative father, during the medically recognized period when conception could have occurred and there was no evidence which eliminated the other man as father, a finding of paternity could not be made. See also *Sass, The Defense of Multiple Access (Exceptio Plurium Concubentium) in Paternity Suits: A Comparative Analysis*, 51 Tulane L. Rev. 468 (1977).

The rationale behind the rule is that, in a paternity suit, the only issue before the court is whether the defendant is the father of the child and he is no less the father because the mother was an immoral or unchaste person.

One area of difficulty arises when the mother testifies to her prior chastity and the putative father attempts to introduce rebuttal evidence for purposes of impeachment. The problem is that "such rebuttal evidence would itself normally be immaterial, and thus inadmissible, as was the evidence it is intended to rebut."⁸⁰ Generally, the admissibility of such evidence depends on whether the mother's claim was elicited during cross-examination or on direct. The Supreme Court of Kansas was confronted with this issue in *Dewey v. Frank*.⁸¹ In that case, the mother revealed on direct examination that she had been a virgin prior to her sexual encounter with the defendant. The trial court had made a pretrial ruling restricting testimony to acts of sexual intercourse only during the period of conception. The trial court refused, however, to allow the defendant to introduce evidence to refute petitioner's claim. On appeal, the court held that, where a party introduces inadmissible and prejudicial evidence, the opposing party may introduce similar evidence "whenever it is needed for removing an unfair prejudice."⁸² Significantly, the court noted that, had the testimony of petitioner's virginity been elicited on cross-examination, "defendant would not have been able to contradict such testimony since it involved a collateral matter."⁸³

Another difficult issue involves the propriety of exhibiting a child to the jury to show family resemblance. The rule allowing evidence of resemblance has been criticized as "inherently unsatisfactory," "unreliable," "speculative," and "fanciful,"⁸⁴ and has led some courts to apparently hold that admission of such evidence is always im-

proper.⁸⁵ Nevertheless, the vast majority of states allow the exhibition of a child as evidence of resemblance to the putative father, either with or without qualification.⁸⁶ The most common qualification on the exhibition of a child was stated by Professor Wigmore when he suggested that the "sound rule" to follow regarding resemblance evidence was "to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indicators."⁸⁷ The issue of whether a child should be exhibited in a given case is generally held to be within the sound discretion of the trial judge and the weight to be accorded such evidence is a matter exclusively for the jury's determination.⁸⁸

Documentary evidence does not usually play a significant role in paternity litigation. One question that may arise in this area is the admissibility of birth certificates as evidence of paternity. The general rule is that, while the fact of a birth may be established by such a record, it may only constitute prima facie evidence on the issue of parentage which may, of course, be rebutted by the putative father.⁸⁹

⁸⁰See *Almeida v. Correa*, 51 Haw. 594, 465 P.2d 564 (1970). For other state decisions, see cases cited in Annot., 55 A.L.R. 3d 1087, § 3 (1974).

⁸¹For a comprehensive listing of states allowing such evidence without apparent qualification; See Annot., 55 A.L.R.3d 1087, § 5(a) (1974).

⁸²1 J. Wigmore, Evidence, § 166 (3d ed. 1940).

⁸³The rule in Arizona, for example, as stated in *State v. Cabrera*, 13 Ariz. App. 527, 529, 478 P.2d 142, 144 (1970), is that the question of

whether a child in a paternity action should be exhibited to the jury to show resemblance to the defendant is largely in the discretion of the trial court, and the jury is the sole judge of the evidence, its weight, and the credibility of witnesses.

See also *State v. Mesquita*, 17 Ariz. App. 151, 496 P.2d 141 (1972).

⁸⁴See 10 Am. Jur. 2d *Bastards* § 27 (1963). Some states have codified this rule. The pertinent Arizona statute provides that A birth, death or fetal death certificate is prima facie evidence of the facts therein stated, but if an alleged father of a child is not the husband of the mother, the certificate shall not be prima facie evidence of paternity if that fact is controverted by the alleged father.

Ariz. Rev. Stat. Ann. § 15-2264 (Supp. 1980-81).

⁸⁰Annot., 59 A.L.R. 3d 659, § 2(a) (1974).

⁸¹211 Kan. 54, 505 P.2d 722 (1973).

⁸²*Id.* at 56, 505 P.2d at 724-5 (citing 1 J. Wigmore, Evidence § 15 (3d ed. 1940)).

⁸³*Id.* at 57, 505 P.2d at 725.

⁸⁴Annot., 55 A.L.R.3d 1087, § 2(a) (1974).

Other evidentiary questions include the competence of the mother to testify to non-access by her husband,⁹⁰ admissions of the alleged father,⁹¹ failure of the mother to notify the father of the pregnancy,⁹² and the distinction between sexual intercourse and the fact of conception.⁹³

IV. Affirmative Defenses

In addition to the conclusive exclusion of a defendant as father which can be accomplished by paternity blood testing⁹⁴ and the evidentiary matters discussed above, there are additional defenses which can be raised by a putative father. These should be affirmatively pled and, if successfully pursued, can result in a favorable verdict or negotiating leverage in a potential out-of-court settlement.

A. The Defense of Sterility

The defense of sterility is somewhat controversial⁹⁵ since one can be deemed medically sterile⁹⁶ or infertile and still be capable of fathering a child. Medically, one is diagnosed as being infertile when either the sperm count is significantly below average i.e., less than 10 million per cc. as compared to an average of well over 100 million per cc., or the mobility of the sperm necessary for fertility is less than 40 percent.⁹⁷ Since it requires only a single

sperm to impregnate the ovum, the controversial nature of the defense of sterility is understandable.

Nevertheless, the defense has been successfully raised in a number of cases,⁹⁸ particularly where the mother is unmarried and thus without the benefit of the presumption of legitimacy. In contrast, where a husband introduces evidence of sterility to rebut the presumption that he is the father of a child born to his wife, the courts have only rarely reversed a trial court's finding of paternity.⁹⁹

Evidence that the putative father has a medical disorder¹⁰⁰ or vasectomy¹⁰¹ resulting in a zero sperm count is usually conclusive of nonpaternity. On balance, however, evidence of sterility is given much less weight than blood test exclusion.

B. The Defense of Fraudulent Conception

A novel defense to an allegation of paternity is raised where the mother's deceit regarding the use of contraception is said to have unconstitutionally infringed on the defendant's right to choose whether to father a child. In *Pamela P. v. Frank S.*¹⁰², the putative father questioned the petitioner regarding her use of contraception. She replied that she was "on the pill." In reality, she was not using birth control pills or any other form of

⁹⁰Schatkin, *supra* note 35, at §§ 3.02-05.

⁹¹*Id.* at § 4.07.

⁹²*Id.* at § 4.08.

⁹³*Id.* at § 4.02.

⁹⁴See e.g., *Michael B. v. Superior Court*, 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (1978).

⁹⁵Schatkin, *supra* note 35, at § 21.01. A good general discussion of the defense of sterility follows at *id.* at §§ 21.01-05.

⁹⁶One should be careful to distinguish between "impotence," the inability to have sexual intercourse, and "sterility," the inability to procreate. The courts, however, often seem to lump the two together. See A. Herzog, *Medical Jurisprudence* § 4165 (1931).

⁹⁷Santomauero, Sciarra, & Varma, *A Clinical Investigation of the Role of Semen Analysis and Post Coital Test in the Evaluation of Male Infertility*, 23 *Fertility & Sterility* 245 (April 1972), cited in *Pyeatte*, 2 *Ariz. App.* 448, 451 n.4, 520 P.2d 542, 545 n.4 (1974).

⁹⁸*In re Stroope's Adoption*, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965); *Potasz v. Potasz*, 68 Cal. App. 2d 20, 155 P.2d 895 (1945); *Comm'r of Welfare v. Wendtland*, 25 A.2d 640, 268 N.Y.S.2d 547 (1st Dep't 1966); *Timm v. State*, 262 Wis. 162, 54 N.W.2d 46 (1952).

⁹⁹*Hughes v. Hughes*, 125 Cal. App. 2d 781, 271 P.2d 172 (1954). See text accompanying notes 28 & 29, *supra*. See also *Groner v. Groner*, 23 Cal. App. 3d 115, 99 Cal. Rptr. 765 (1972). But see *Lucas v. Williams*, 218 Md. 322, 146 A.2d 764 (1958); *Tosh v. Tosh*, 214 Cal. App. 2d 483, 29 Cal. Rptr. 613 (1963); *Houston v. Houston*, 199 Misc. 469, 99 N.Y.S.2d 199 (Fam. Ct. Queens County 1950); *Smith v. Smith*, 71 S.D. 305, 24 N.W.2d 8 (1946).

¹⁰⁰See *Timm v. State*, 262 Wis. 162, 54 N.W.2d 46 (1952).

¹⁰¹See *Gray v. Richardson*, 340 F. Supp. 680 (N.D. Ohio 1972).

¹⁰²110 Misc.2d 978, 443 N.Y.S.2d 343 (Fam. Ct. N.Y. County 1981). The respondent in the case was Frank Serpico, the New York City policeman who came to notoriety with his disclosures of corruption within the police department leading to the formation of the Knapp Commission in 1969.

contraception. Furthermore, the act of sexual intercourse occurred during the most fertile phase of her monthly reproductive cycle. Although the mother denied having discussed contraception, a witness testified that she had told him that she would have a child by the respondent "whether he wanted to or not and that she would refrain from telling him she was off birth control pills."¹⁰³

Answering the subsequent paternity suit, the respondent claimed that he should not be liable for the support of the child because of the mother's deliberate and false misrepresentation to him regarding contraception. He also argued that a court order of support would violate his constitutional freedom to choose whether or not to beget a child.

The court observed that the common law concepts of fraud and deceit were applicable to domestic relations laws and, therefore, held that the petitioner's planned and intentional deceit precluded her from transferring to the respondent her financial burden "for the child she alone chose to have."¹⁰⁴ The court also agreed with respondent's contention that he was constitutionally guaranteed the freedom of choice to use contraception and to avoid procreation. Consequently, under the *Shelly* principle¹⁰⁵, the court would not enter an order of support.

The constitutional basis of the defense of fraudulent conception was articulated by Justice Brennan in *Carey v. Population Services International*¹⁰⁶:

The decision whether or not to beget a child is at the very heart of this cluster of constitutionally protected choices . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are

among the most private and sensitive. If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁰⁷

The *Carey* Court balanced this constitutional infringement of respondent's freedom of choice concerning procreation against the deeply rooted notion of parental responsibility and duty to support one's child. The Court reconciled these two conflicting principles by holding that it would enter an order of support against the father only if the petitioner's means were insufficient to meet the child's fair and reasonable needs.

Faced with identical facts, the putative father in *Stephen K. v. Roni L.*¹⁰⁸ filed a cross-complaint for fraud, negligent misrepresentation, and negligence claiming that, as a proximate result of the mother's conduct, he had become obligated to support the child financially and had "suffered mental agony and distress" all to his general damage in the amount of \$100,000.00.¹⁰⁹

The court declined to attach tort liability to the deceptive acts of the mother, stating that "as a matter of public policy the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference."¹¹⁰ The court did not discuss the possi-

¹⁰³*Id.* at 979, 443 N.Y.S.2d at 344.

¹⁰⁴*Id.* at 981, 443 N.Y.S.2d at 346.

¹⁰⁵The *Shelly* principle derives from the Supreme Court decision *Shelly v. Kramer*, 334 U.S. 1 (1948), where the court held that the prohibitions of the Fourteenth Amendment include actions by private individuals when the individual attempts to utilize the state courts to effectuate their conduct.

¹⁰⁶431 U.S. 678 (1977).

¹⁰⁷*Id.* at 684-85 (citing to *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). See also *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, *reh'g denied*, 414 U.S. 881 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

¹⁰⁸105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

¹⁰⁹*Id.* at 641, 164 Cal. Rptr. at 619.

¹¹⁰*Id.* at 643, 164 Cal. Rptr. at 621. As to the father's claim that he was tricked into fathering a child he did not want, the court noted that

no good reason appears why he himself could not have taken any precautionary measures. Even if Roni had regularly been taking birth control pills, that method, though considered to be the most reliable means of birth control, is not 100 percent effective.

ble constitutional infringement of defendant's right to avoid procreation. It did, however, comment that to allow defendant's claim would "encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."¹¹¹

The above cases are the only reported decisions discussing the ramifications of a mother's deception regarding the use of contraception in a paternity action. The law is too unsettled to predict whether, under similar facts, a father will be able to successfully convince a court to limit his liability for child support. Counsel should be conscious, however, of any fraudulent conception and aggressively raise the issue on behalf of the putative father.¹¹²

V. Compromise and Settlement

During the course of litigating or counseling the servicemember, counsel should not lose sight of the possibility of reaching an out-of-court settlement. The principal concern in any attempted paternity settlement is the binding effect of such an agreement on the parties. Absent an authorizing statute, the common law rule appears to state that a release or covenant not to sue is binding on the mother only if it is found to be fair and adequate.¹¹³ There are cases, however, holding that such agreements are never valid, irrespective of their terms.¹¹⁴ Where states statutorily provide for the settlement of paternity claims, a general requirement is that the agreement be submitted to the court for judicial approval. Once approved, the agreement becomes binding on the mother. One possible rationale of such statutes is that:

The legislatures that have included judicial approval in paternity legislation un-

doubtedly did so because they recognized that a man, alleged to be the father cannot easily be induced to pay for the child's support when through legal advice or in some other way, he learns that the mother's agreement gives no assurance of legal peace. Presumably the hope has been that, by making a settlement binding if judicial approval is obtained, settlements will be encouraged.¹¹⁵

As with other areas of disputed paternity proceedings, statutes concerning judicial approval of compromise and settlement agreements vary significantly among the states. For example, there are statutory variations involving the necessity of filing suit prior to obtaining judicial settlement, resolving whether or not the putative father must admit paternity, and the binding effect of the settlement on third parties.

Several paternity statutes discuss settlement in terms of the conditions by which a suit "may be dismissed"¹¹⁶ or "terminated."¹¹⁷ The implication of such wording is that a suit must be filed before one can receive judicial approval of a settlement agreement. The same implication can be drawn from those statutes which provide for settlements "on the basis of the information produced at the pre-trial hearing."¹¹⁸ A few states expressly permit

¹¹¹See Havighurst, *supra* note 113, at 464.

¹¹²See, e.g., Mass. Ann. Laws ch. 273, § 17 (Michie/Law. Co-op Supp. 1981).

¹¹³See, e.g., Ariz. Rev. Stat. Ann. § 12-849(G) (Supp. 1981-82) ("Any action commenced under this article shall be terminated by agreement and compromise only when the court has approved the terms of such agreement and compromise").

¹¹⁴See, e.g., Haw. Rev. Stat. § 584-13 (Supp. 1981); Nev. Rev. Stat. § 126.141 (Supp. 1981). Colo. Rev. Stat. § 19-6-114 (Supp. 1981) provides, for example that:

[O]n the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties, which may include any of the following:

(b) That the matter be compromised by an agreement among the alleged father, the mother, and the child in which the father and child relationship is not determined but in which a defined economic obligation is undertaken by the alleged father in favor of the child and, if appropriate, in favor of the mother, subject to approval by the judge or referee conducting the hearing. In reviewing the obligation undertaken by the alleged

¹¹¹*Id.* at 642, 164 Cal. Rptr. at 620-21.

¹¹²The authors raised the defense of fraudulent conception in the defense of a servicemember involved in a paternity suit. The pursuit of the defense was one of the factors leading to a successful compromise and settlement. *Krupski v. Pyle*, No. DR-977 (Ariz. Super. Ct. 1981). For a more indepth discussion at the *Krupski* case see note 129 and accompanying text, *infra*.

¹¹³Havighurst, *Settlement of Paternity Claims*, 3 Ariz. St. L. J. 461, 462 (1976).

¹¹⁴See, e.g., *Lawrence v. Boyd*, 207 Kan. 776, 486 P.2d 1394 (1971); *Annot*, 84 A.L.R.2d 524 (1962).

settlement "before or after" a petition has been filed,¹¹⁹ but the majority of statutes are silent on the issue.

An even more important question is whether a putative father must admit paternity in order to obtain a judicially approved settlement. In the majority of states, it may be inferred that the courts will approve a settlement regardless of whether the defendant admits or denies paternity.¹²⁰ A few states, however, refer to agreements with "the father."¹²¹ The problem with such limitation is that it works an injustice on a man who denies paternity but, nevertheless, is willing to enter into a binding compromise. One ramification of admitting paternity is that, notwithstanding the compromise, the mother may be permitted to later seek revision of the agreement.¹²²

Even when the settlement can be said to be binding on the mother, the question arises as to the binding effect on third parties—particularly the child. In *Backora v. Balkin*,¹²³ an infant, through her guardian *ad litem*, brought an action to establish identity and fix birthright and parentage. The defendant moved to dismiss on the basis of a settlement and compromise entered into between himself and the mother of the plaintiff arising out of a prior action for paternity. The terms of the settlement expressly reserved the issue of

parentage of the child. The court held that the agreement, although properly approved, was not a bar to an action by the child to establish identity. Interestingly, the court declined to "speculate as to whether there may be additional rights once identity is established or what those rights may be." The court also expressed "no opinion as to whether the child could enforce her right to support and education."¹²⁴

Another potential problem facing those attempting to draft a binding agreement is whether public officials, such as a state welfare commissioner, is bound by a compromise entered into between a mother and alleged father. There is some support for the proposition that, even if the state receives notice of the terms of the agreement, it will still be permitted to bring suit if the child is likely to become a public charge, unless it had given affirmative consent to the agreement.¹²⁵

For a settlement to be binding and effective it must conform to the requirements of the applicable statute. The Washington Supreme Court considered the binding effect of an agreement which did not comply with that state's statutes in *State v. Bower*.¹²⁶ The defendant in that case settled with the mother, who accepted a lump sum of \$2,100 and waived all claims which she may have had against him for child support or any other expenses in connection with the birth of the child. At the time she signed the agreement, the mother's only income was \$42.00 per week unemployment compensation. The agreement was not submitted for judicial approval nor did it provide for the "maintenance, care, education, and support of the child" as required by the then-extant Washington statute.¹²⁷ The court had little difficulty in holding that the agreement of the parties was not binding and, therefore, did not bar subsequent proceedings on the issue of paternity and child support.

father in a compromise agreement, the judge or referee conducting the hearing shall consider the best interest of the child, in the light of the factors enumerated in section 19-6-116(5), discounted by the improbability, as it appears to him, of establishing the alleged father's paternity or nonpaternity of the child in a trial of the action.

¹¹⁹See, e.g., Conn. Gen. Stat. Ann. § 46b-170 (Supp. 1981); Md. Fam. Law Code Ann. § 66L (Supp. 1981).

¹²⁰Such a conclusion can be inferred from the use of terms like "putative father" or "alleged father."

¹²¹Mich. Stat. Ann. § 25.493 (Supp. 1981-82) refers to: "[A]n agreement or compromise made by the mother or child or by some authorized person on their behalf *with the father* concerning the support and education of the child." (emphasis added). Similarly, Okla. Stat. Ann. tit. 10, § 71-85 (1981) limits settlements to "the natural father."

¹²²See Havighurst, *supra* note 113, at 469.

¹²³14 Ariz. App. 569, 485 P.2d 292 (1971).

¹²⁴*Id.* at 572, 485 P.2d at 295.

¹²⁵See Havighurst, *supra* note 113, at 470-71.

¹²⁶80 Wash.2d 808, 498 P.2d 877 (1972).

¹²⁷The court cited to Washington's then statute, Wash. Rev. Code § 26.24.030 (1972). 80 Wash.2d at 811, 498 P.2d at 880.

There are several practical considerations regarding compromise and settlement of a paternity suit which counsel should consider when representing the alleged father. The majority of these factors are matters of common sense. Generally, the willingness of the plaintiff-mother to enter into a compromise is directly related to the length and difficulty of the paternity proceedings weighed against her perceived chances of success. Consequently, by strongly representing the rights of the servicemember, the legal assistance officer may contribute to the possibility of a favorable settlement. If the suit is commenced in another state, issues of jurisdiction or validity of service of process should be explored and the soldier's rights under the Soldiers' and Sailors' Civil Relief Act¹²⁸ asserted. This, coupled with a common misunderstanding by both private counsel and state agencies concerning the difficulties of proceeding against a soldier while on active duty, may pave the way for compromise.

Additionally, the mother's resolve may weaken as the proceedings continue. Paternity suits are often initiated out of hurt and anger when the individual whom the mother believes to be the father refuses to accept that responsibility. The mother may feel betrayed or abandoned and a court action seems a good way of striking back as well as protecting herself. As time goes on, the initial passions give way to the realities of the litigation process. As the trial date nears, the realization of the potential embarrassment and invasion of personal privacy which the trial entails may sink in, especially when the alleged father intends to show that other men had intercourse with the plaintiff at the time of possible conception.

The factors that can lead to a successful compromise and settlement can perhaps be best illustrated by the following case example.¹²⁹ A

¹²⁸50 U.S.C. §§ 500-548, 560-591 (1976). See Dep't of the Army, Pamphlet No. 27-166, Soldiers' and Sailors' Civil Relief Act (15 Aug. 1981).

¹²⁹Facts are taken from *Krupski v. Pyle*, No. DR-977 (Ariz. Super Ct. 1981), in which the Fort Huachuca Legal Assistance Office provided legal representation to the putative father pursuant to the Expanded Legal Assistance Program. See Army Reg. No. 608-50, Personal Affairs-Legal Assistance, para. 4d (22 Feb. 1974).

soldier contacted the legal assistance office and indicated that he has been served with a paternity petition alleging him to be the father of an as yet unborn child. The servicemember admits to having had sexual relations with the mother on one or two occasions during the time of conception but explains that she had told him she "was on the pill." He later finds out that she was not taking birth-control pills and had been wanting a baby for quite some time. The soldier claims that others in his unit also had intercourse with the plaintiff during the conception period.

The legal assistance officer answers the complaint with a general denial and assertion of the affirmative defense of fraudulent conception.¹³⁰ Extensive discovery is then initiated, including the propounding of interrogatories, requests for admissions, continuing interrogatories, and conducting of interviews and depositions. The discovery process is accompanied by various procedural skirmishes on such matters as motions to compel, to amend the pleadings, and to enlarge time such as for failure to respond to requests for admissions within the allotted time.

During this time counsel also enter into discussions regarding a stipulation to submit to blood testing. The parties agree to wait until the child reaches at least six months of age, but the legal assistance officer refuses to agree to a stipulation as to the admissibility of the blood test absent a proper foundation.

Six months later, the putative father receives indication through mutual friends that the mother is starting to have second thoughts about the suit. This is apparently because so much time has elapsed without progress while, at the same time, she has incurred extensive legal expenses. There is also a growing desire to avoid the necessity of having to go through a contested trial. A research of the local law reveals that a paternity suit may be dismissed by agreement and compromise with the permission of the court. Negotiations are entered

¹³⁰See notes 102-112 and accompanying text, *supra*.

into between counsel but the issue of admission of paternity constitutes a major stumbling block.¹³¹

Two or three months pass without agreement until, finally, the mother agrees to payment of the soldier's BAQ during his present tour of duty in return for dismissal with prejudice of the paternity suit without an admission of paternity. An agreement and compromise is executed and its terms incorporated into a stipulation and order of dismissal with prejudice and child support.¹³² The soldier

is informed, however, that the child may have additional rights which are not affected by the agreement.

The above example demonstrates how, as with most cases involving a defendant in a civil suit, time and perseverance works to counsel's advantage. Although not all cases can be resolved by compromise, the possibility of an out-of-court settlement should be explored in each instance.

VI. Conclusion

The increased initiation of paternity proceedings by governmental entities and private parties alike highlights the need for an informed and skilled legal assistance officer. The legal assistance officer has a myriad of issues to explore in counseling putative fathers in paternity cases. Any of these issues could serve as a potential defense or as a basis for a compromise or settlement. Counsel should insure that the clients' rights under AR 608-99 have been observed and that any support requirement initiated by the military has been effected only upon proper documentation. Factual issues such as the duration of the pregnancy and condition of the newborn child should be explored and, where applicable, counsel should be aware of the pertinent state law concerning the survivability of the paternity action and the admissibility into evidence of the results of HLA testing. Affirmative defenses should be considered both as instruments to be used at trial and as bargaining chips in seeking an out-of-court settlement. In sum, legal assistance officers should be thoroughly versed in the law, conversant with the facts, and alert to developments in medical-scientific technology, such as HLA testing, which might bear on their clients' cases. Armed with these tools, the judge advocate will be better prepared to render informed, professional advice and service to the client in keeping with the highest standards of the Judge Advocate General's Corps.

¹³¹Following the general rules of evidence, any admission made during compromise and settlement negotiations would not be admissible into evidence against the alleged father. See *Simmons v. State*, 98 Ga. App. 159, 105 S.E.2d 356 (1958). However, counsel should always caution his client regarding statements or conduct that might be construed as an admission of paternity.

¹³²The following agreement and compromise was drafted by the Fort Huachuca Legal Assistance Office. Preceding the main body of the text were several recitals relating to the filing of the action, the applicable statute, the purpose of the settlement, and that all parties had received legal counsel:

I. DISMISSAL OF ACTION

In consideration of Respondent's agreement to pay child support as detailed below, Petitioner agrees to the dismissal of her Complaint against Respondent, with prejudice, and further agrees to abstain from bringing any further action, of any kind whatsoever, arising from the birth of the child which is the subject of this paternity suit.

II. CHILD SUPPORT

In consideration of Petitioner's dismissal of this paternity suit, Respondent agrees to pay child support for [child's name], by military allotment, in the amount of his Basic Allowance for Quarters (BAQ) at the with-dependent's rate. Respondent's present BAQ is \$235.50 per month. This obligation is to continue through Respondent's current tour of service which ends in November 1983.

III. DENIAL OF PATERNITY

Petitioner understands that Respondent's agreement to pay child support is in no way an admission of paternity, but rather, in compromise and settlement of the paternity suit and for the sole purpose of avoiding the time and expense of further litigation.

IV. RIGHTS OF CHILD

Both parties understand that the child which is the subject of this paternity suit may have legal rights not affected by this agreement and compromise.

The Federal Courts Improvement Act of 1982: Two Courts Are Born

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On 1 October 1982 the federal government gave birth to two new courts—the United States Court of Appeals for the Federal Circuit and the United States Claims Court. The courts were created by the Federal Courts Improvements Act of 1982¹ and will separate into two new courts the trial and appellate functions of the present Court of Claims and the Court of Customs and Patent Appeals.

This article will highlight the major changes that will take place as the result of the Act but will not touch upon the Act's numerous provisions dealing with administration and housekeeping matters.

The United States Court of Appeals for the Federal Circuit (CAFC) The CAFC will become the only federal court of appeals whose jurisdiction is defined in terms of subject matter rather than geography. It will, however, be an Article III court equal in stature to the other courts of appeal. The CAFC will inherit the appellate functions of the two courts being abolished by the Act and will hear appeals from the new United States Claims Court, the Court of International Trade (formerly the Customs Court), the Patent and Trademark Office, the Merit System Protection Board, and other statutorily defined agencies.²

The CAFC will be composed of twelve judges,³ sitting in panels of three or more.⁴ The judges will hold regular sessions in the District of Columbia or in any of the cities in which the other twelve courts of appeal meet.⁵

The United States Claims Court⁶ This new trial level court will also have its principal place of

business in the District of Columbia but can hold sessions elsewhere. The court will be established under Article I of the Constitution, have sixteen judges, and will essentially take over the role of the current U.S. Court of Claims' Trial Commissioners, *i.e.*, a trial court designed to find facts.

General Purpose The major purpose behind the Act is to establish an appellate forum to resolve questions in areas of the law in which Congress felt a special need exists for nationwide uniformity. The most notable of these areas are government contract law and patent law.

Procedural Impact on Government Contracts Pre-Award Litigation The Act changes the forums available to handle both pre-award and post-award government contract litigation. The U.S. Claims Court has been given jurisdiction "to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief," in the pre-award stage of the procurement process.⁷ Under the Act, an unsuccessful bidder can now go to a court that has clear statutory authority to grant such relief.

This new power complements the current Court of Claims pre-award jurisdiction to award money damages based on breach of an implied contract to fairly consider the contractor's bid. Thus, the new U.S. Claims Court can be the single forum to handle pre-award issues with its power to grant both equitable relief and monetary damages.

In the past, contractors seeking judicial assistance on pre-award matters had to first find a district court willing to follow the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Scanwell Laboratories, Inc. v. Shaffer*⁸ in

¹Pub. L. No. 97-164, 96 Stat. 25 (1982).

²*Id.* at § 127(a).

³*Id.* at § 102(a).

⁴*Id.* at § 103.

⁵*Id.* at § 104.

⁶*Id.* at § 105.

⁷*Id.* at § 133(a). The issue whether the U.S. Claims Court has equitable powers post award in aid of monetary judgments is not addressed in the legislation.

⁸424 F.2d 859 (D.C. Cir. 1970).

order to enjoin the government from awarding the contract pending resolution of their protest. Then, if the protest was decided favorably to the contractor, it could go to the Court of Claims for monetary relief. The district court's power to grant monetary relief in a contract matter was taken away by the Contract Disputes Act of 1978.⁹

Substantive Impact on Government Contracts Litigation The legislative history of this section of the Act makes it clear that Congress did not intend to alter the current state of the substantive law in the pre-award area, *i.e.*, the *Scanwell* doctrine, but desired to place in one forum the power to grant complete relief on pre-award matters.¹⁰ While that may be the legislative intent, some commentators feel that statute as actually drafted eliminates district courts from pre-award equitable relief in contract cases.¹¹

Whether or not district courts retain their pre-award powers, the U.S. Claims Court will exercise its own equitable relief powers in limited circumstances. The Senate Report states that the "Committee expects that the court will utilize the [equitable relief] authority . . . only in circumstances where the contract, if awarded, would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award."¹² The Act itself says, "In exercising this jurisdiction, the court shall give due regard to the interests of national defense and security."¹³ Thus, it seems that the standards to be used by the U.S. Claims Court in exercising its pre-award equitable relief powers will be the same as those currently used by the district courts, *i.e.*, before an injunction will issue, an unsuccessful offeror must establish that the actions of contracting officials are ir-

rational and, on balance, the public interest is served by issuing an injunction.¹⁴

The Act also alters contract disputes procedures. Under the new system, a contractor can directly appeal the final decision of a contracting officer to either an agency board of contract appeals or to the new U.S. Claims Court.¹⁵

Procedural Impact on Government Contracts Post-Award Litigation Once the board or the court has entered a decision, both the government and the contractor have the option to appeal further to the CAFC.¹⁶

The time periods for and methods of filing this further appeal differ depending upon the forum from which the appeal arises. If the appeal is from the board of contract appeals, the notice of appeal must be filed within 120 days after the date of receipt of a copy of the board's decision.¹⁷ This is accomplished by dispatching the appeal to the CAFC. However, if the appeal is from the U.S. Claims Court, the notice of appeal is filed directly with the clerk of the U.S. Claims Court.¹⁸ It must be filed within 60 days after the date of entry of the judgment or order appealed from.¹⁹ Decisions of the CAFC may be appealed to the United States Supreme Court in the same fashion as decisions from other courts of appeal.²⁰

⁹Pub. L. No. 95-563, 92 Stat. 2383 (1978).

¹⁰S. Rep. No. 97-275, 97th Cong., 2d Sess. 23 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 33.

¹¹38 Fed. Cont. Rep. 33 (12 July 1982).

¹²See S. Rep. No. 97-275, *supra* note 10.

¹³Pub. L. No. 97-164, § 133(a) (amending 28 U.S.C. § 1491(a)(3) (1976)).

¹⁴*M. Steinthal & Co. v. Seaman*, 455 F.2d 1289 (D.C. Cir. 1971).

¹⁵Pub. L. No. 97-164, § 161(10) (amending 41 U.S.C. § 609(a)(1) (1976)).

¹⁶Pub. L. No. 97-164, § 156 (amending 41 U.S.C. § 607(g)(1) (1976)); *id.* at § 139(g)(1) (amending 28 U.S.C. § 2522).

¹⁷Pub. L. No. 97-164, § 156 (amending 41 U.S.C. § 607(g)(1) (1976)).

¹⁸Pub. L. No. 97-164, § 139(q)(1) (amending 28 U.S.C. § 2522 (1976)).

¹⁹*Id.* 28 U.S.C. § 2522 (1976) requires the filing of a notice of appeal "within the times and in the manner prescribed for appeals to United States courts of appeals from United States district courts." Fed. R. App. P. 4(a) allows 60 days to appeal cases in which the government is a party.

²⁰28 U.S.C. § 1254 (1976).

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Line Of Duty) Frostbite Injuries Incurred By AWOL Servicemember While Psychotic Were Incurred In Line Of Duty; Lost Time Was Excused As Unavoidable. DAJA-AL 1982/1176 (24 February 1982).

The Army Board for Correction of Military Records requested a legal opinion concerning an application for correction of military records requesting that AWOL charges be deleted from the military records of a now-deceased SM. The SM was AWOL from his unit in Germany from 13 January to 15 January 1978. He apparently spent those three days in an abandoned automobile and developed severe frostbite of the feet. The SM's commander refrained from preferring charges because the SM was found by the Inpatient Psychiatry Department of an Army hospital not to be mentally responsible for the absence. In 1981, The Surgeon General of the Army rendered an advisory opinion that the SM was psychotic at the time of the AWOL.

TJAG determined that if the SM was not mentally sound at the inception of the AWOL period, then the LOD finding cannot be NLOD merely on the basis of the AWOL status (para. 2-7a, AR 600-33 (16 December 1974) (then in effect)). [The current para. 2-7a, AR 600-33 (15 June 1980) is nearly identical.] Furthermore, injuries suffered as a result of a psychotic episode would not be considered to have been incurred due to the SM's own misconduct (para. 2-8a, AR 600-33 (then in effect)). [Note that the current para. 2-9, AR 600-33 contains the broader terms "mental and emotional disorders" while para. 2-8a of the regulation then in effect contained the term "psychoses." The result would apparently be the same under the current regulation.] TJAG concluded

that an adverse LOD finding could not be properly based on either the SM's AWOL period or misconduct.

TJAG stated that the three days of lost time could be excused as unavoidable if it were determined that it occurred through no fault of the SM or the Government (paras. 1-3h and 1-14d, AR 630-10 (28 January 1974) (then in effect)). [The result apparently would be the same under paras. 1-3i and 1-9 of the current AR 630-10 (15 January 1980).] The SM's lack of mental capacity, as determined by medical officials and later verified by The Surgeon General, is sufficient to support an action by the ABCMR to excuse the three-day AWOL as an unavoidable absence and delete the lost time from the SM's records.

(Pay) Member Married to Another Member And Otherwise Without Dependents May Elect Payment Of BAQ And Refuse Proffer Of Government Quarters. DAJA-AL 1982/1229 (5 March 1982).

The provisions of 37 U.S.C. § 403(b), as amended in 1980, allow members in pay grades above E-6 who are without dependents to elect to receive BAQ and refuse government quarters, unless the election would adversely affect military discipline or readiness. Where one member is married to another, both are entitled to the benefits of Section 403(b) if they are otherwise "without dependents" for BAQ purposes. Neither spouse is considered to be the dependent of the other and both are therefore considered to be members without dependents for the purposes of the statute. If one member has a dependent and lives in government quarters, the other member "without dependents" may still elect to receive BAQ and decline quarters.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Extenuation and Mitigation

The military judge is permitted to relax the rules of evidence with respect to presentencing matters. Para. 75c(3), Manual for Courts-Martial, United States, 1969 (Rev. ed.). As a result, trial defense counsel may introduce letters, affidavits, and certificates from military and civilian sources where their authenticity and reliability are apparent. In a recent appeal before the Army Court of Military Review, trial counsel was apparently irked during presentencing by the exclusion of a record of non-judicial punishment and consequently launched repeated objections to numerous defense exhibits on the basis of hearsay, authentication, and relevancy. *United States v. Brewer*, SPCM 17521 (A.C.M.R., appeal filed 26 July 1982). These exhibits included letters from appellant's mother, wife, minister, and civilian employer as well as certificates regarding good duty performance. The military judge overruled the objections but defense counsel was apparently intimidated and withdrew two of the exhibits. Trial counsel then lodged various objections to the testimony of appellant and his character witnesses. These objections were similarly overruled. The government on appeal is now faced with the issue of whether the military judge abused his discretion in failing to halt the trial counsel's "vindictive and untutored objections" which interfered with appellant's ability to present favorable evidence.

Trial counsel should avoid creating this needless appellate issue by limiting their objections on presentencing. Trial counsel should remember that the rules of evidence are also relaxed for the gov-

ernment in introducing rebuttal evidence to the extenuation and mitigation. Para. 75d, MCM, 1969. Moreover, trial counsel in a contested case can now initially present aggravating evidence which is directly related to the offenses for which an accused is to be sentenced. *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982).

2. Multiplication of Charges

The Government Appellate Division continues to receive cases in which allegations of an unreasonable multiplication of charges are raised on appeal. In a recent case a male captain committed three acts of sexual intercourse with a female sergeant in his unit. *United States v. Jefferson*, CM 442048 (A.C.M.R., appeal filed 5 April 1982). The captain was charged not only with six specifications under Article 134, UCMJ, for adultery and fraternization, but also six more specifications under Article 133, UCMJ, for conduct unbecoming an officer for the same adultery and fraternization. At trial the military judge *sua sponte* dismissed the six specifications under Article 134. The issue on appeal is whether the three adultery specifications charged under Article 133 were multiplicitous for findings with the three fraternization specifications referring to the same three acts. Staff judge advocates can avoid this unnecessary issue on appeal by ensuring that charges are properly investigated and that any multiplication of charges is justified by exigencies of proof. Unreasonable multiplication can lead to substantial sentence reduction and even the dismissal of all the charges on appeal. *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982).

Judiciary Notes

US Army Legal Services Agency

1. Convening Authority's Actions

a. In the examination of cases under Article 69, UCMJ, it has been noted that errors are being made in actions approving and suspending punishments mentioned in Article 58a, UCMJ, and re-

taining the accused in his present or intermediate grade. Merely suspending the punitive discharge, the confinement, or the hard labor without confinement is not enough. When the adjudged sentence does not include a reduction to the grade of

E-1, the action must state that the accused will serve or continue to serve in a certain grade. See Form 50, Appendix 14d, MCM, 1969 (Rev. ed.). When the sentence of the court-martial includes a reduction to the grade of E-1, either Form 51 or Form 52, Appendix 14d, MCM, should be used.

b. A number of commands continue to apply forfeitures to pay and allowances when the approved sentence includes forfeiture of pay only. This is incorrect. The application clause should in such case read, "The forfeitures shall apply to pay becoming due on or after the date of this action." Of course, if the sentence has been properly ordered into execution, that statement is unnecessary.

2. Requests for Statistical Output From The Judge Advocate General Management Information System (JAGMIS)

Since April 1981, the Clerk of Court for ACMR has been operating a computerized information system which compiles court-martial and other disciplinary and related data from reports submitted by GCM jurisdictions Army wide (JAG-2). JAGMIS has suffered from many growing pains, not the least of which has been USALSA's dependence on the US Army Computer Systems Command (USAMSSA) for hardware and programming support, coupled with the Corps' ever-increasing demand for manipulation and output of statistical data. Currently, Agency personnel are in the process of revising procedures for input of data from the new JAG-2 Form (included in the next change to AR 27-10) to incorporate data from Summarized Article 15 procedures, as well as developing several new records within the JAGMIS file. This growing development of JAGMIS has taxed the Agency's personnel to the maximum, and resulted in a request from USAMSSA that no further programs be developed until the existing programs have been completed.

Over the past several months, due to the widening awareness of the existence of JAGMIS and its potential, the Clerk's Office has experienced a significant increase in requests for statistical data output from the field. Some of the requests are based on legitimate and immediate needs for such information in direct support of field programs and projects. Many of the requests, however, are for "nice-to-know" information for local briefings or conferences. A number of the requests are for historical data which require manual search rather than automated retrieval. The requests have reached such a proportion that they are beginning to be overwhelming for a number of reasons. Requests for data that cannot be extracted from the Quarterly JAG-2 Report or other reports already prepared must be specially programmed by support personnel. The agreement with USAMSSA dictates that no such special requests will be made until our current requirements are fully developed. Additionally, requests for output delay input of the current data constantly being received with a resultant delay in production of required recurring reports. Lastly, some requests are for data which is easily obtainable from other sources, such as the Quarterly JAG-2 Report.

Due to the increasing burden of requests for statistical data from the field, all future requests will be addressed to the Commander, USALSA, in writing. While certainly one of the objects of the development of JAGMIS is to serve the Corps within its capabilities, JAGMIS is still in a relatively embryonic stage and must be allowed to fully develop. USALSA will do its very best to satisfy "mission critical" requests for information. The "nice-to-know" requests will be evaluated more closely and in a manner consistent with our agreements with USAMSSA. Cooperation of all judge advocates will enable that development to be completed as soon as possible.

Reserve Affairs Items

Reserve Affairs Department, TSAGSA

1. JAGSO Triennial Training. The Judge Advocate General's Service Organizations Triennial Training will be conducted at The Judge Advocate

General's School from 20 June to 1 July 1983 for Court-Martial Trial and Court-Martial Defense Teams. Inprocessing of team members will take

place on Sunday, 19 June 1983. Attendance will be restricted to officers assigned to Court-Martial Trial or Defense Teams. Alternate AT should be scheduled for warrant officers and enlisted members. The 1155th United States Army Reserve School, Edison, New Jersey will host the training. Orders should reflect assignment to the 1155th USARS with duty station at TJAGSA.

2. JAOAC Phase II. The Judge Advocate Officer Advanced Course (Phase II) will also be conducted from 20 June-1 July 1983. Inprocessing will also take place on Sunday, 19 June 1983. Transfers will not be allowed from one course to the other after arrival at Charlottesville. Quotas for ARNG will be available through channels from the Education Branch, National Guard Bureau. Quotas for USAR will be available through channels from the JAGC Personnel Management Officer, RCPAC. Requests for quotas should be received no later than 1 April 1983. The 1155th United States Army Reserve School, Edison, New Jersey will host the training. Orders should reflect assignment to the 1155th USARS with duty station at TJAGSA.

3. Certification Under Article 27b, UCMJ, of Reserve Component Judge Advocates. The Judge Advocate General has directed the Commandant, TJAGSA, to initiate action to certify all Reserve Component (RC) judge advocates who have completed the Judge Advocate Officer Basic Course. This action will improve the readiness posture of the Judge Advocate Legal Service. Certification orders and extracts will be prepared at TJAGSA, with two copies to be sent to each RC judge advocate who will retain one copy and file the other in the officer's Military Personnel Records Jacket. A third copy will be retained at TJAGSA. Newly appointed RC judge advocates who have completed the Basic Course will be certified when approved for appointment and will be sent the certification extract with their notice of appointment. Reserve judge advocates who have not completed the Judge Advocate Officer Basic Course prior to appointment will be required to do so before certification. All RC judge advocates who have completed the Basic Course but do not receive their certification orders prior to 1 January 1983 should contact the Reserve Affairs Department, TJAGSA. It is the responsibility of each

RC judge advocate to maintain a personal copy of the certification order.

After Article 27b, UCMJ, certification, the officer must be administered the counsel's oath (DA Form 3496-R) before performing as counsel before a court-martial. Because the council's oath must be administered by a JAGC officer on active duty, the certified reserve judge advocate may report to an active duty JAGC office for the oath or wait until detailed as counsel and receive the oath before the court. In either case, one copy of the oath must be retained by the judge advocate who took the oath, one copy filed in the officer's Military Personnel Records Jacket, and a third copy forwarded to the Reserve Affairs, Department, TJAGSA (see para 11-4, AR 27-10).

4. Reserve Component Technical (On-Site) Training Schedule Academic Year 1982-83. a. The following schedule sets forth the training sites, dates, subjects, instructors and local action officers for the Reserve Component Technical (On-Site) Training Program for Academic Year 1982-83. All judge advocate officers (active, reserve, National Guard, and other services) are encouraged to attend the training sessions in their areas. Reserve Component judge advocates assigned to JAGSO detachments or to judge advocate sections of USAR and ARNG troop program units are required to attend the training for their geographical area (Paragraph 1-3, Appendix I, FORSCOM Reg. 350-2 and AR 135-316). Individual Ready Reserve (IRR) judge advocates (those assigned to the Control Group (Reinforcement), Mobilization Designation, Annual Training, or Standby) are encouraged to attend this training. These officers will receive two retirement points for each day of attendance. Active duty judge advocate, Department of the Army civilian attorneys and Reserve Component personnel who are attorneys but not judge advocates are also invited. This technical training has been approved by several states for CLE credit and occasionally is co-sponsored with some other organization, such as the Federal Bar Association. The local action officer will have information in this regard.

b. Action officers are required to coordinate with all Reserve Component units having judge advocate officers assigned and with active armed

forces installations with legal personnel, and are required to notify all members of the IRR that the training will occur in their geographical area. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

c. JAGSO detachment commanders should insure that unit training schedules reflect the scheduled technical training. SJA's of other Reserve Component troop program units should insure that the unit schedule reflects that the judge advocate section will attend technical training in accordance with the below printed schedule RST (regularly scheduled training), as ET (equivalent training) or on manday spaces. It is recognized

that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

d. Questions concerning the on-site instructional program should be directed to the appropriate action officer at the local level. Problems which cannot be resolved by the action officer or the unit commander should be directed to Major John W. Long, Chief, Unit Training and Liaison Office, Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901 (telephones 804-293-6121, or Autovon 274-7110, Extension 293-6121).

**APPROVED SCHEDULE FOR RESERVE COMPONENT
TECHNICAL (ON-SITE) TRAINING PROGRAM, AY 82-83**

Trip	Date	City, Host Unit And Training Site	Subject	Instructors	Action Officers Address & Phone Nos.
1.	16 Oct 82	Little Rock, AR 122d ARCOM Seymour Terry Armory (UALR Campus) 3600 Pierce Street Little Rock, AR 72204	Admin & Civil Law International Law	MAJ William C. Jones MAJ James F. Gravelle	MAJ Donald Rebsamen Workman's Comp. Comm. Justice Building Little Rock, AR 72201 Ofc: (501) 372-3930 Hm: (501) 664-5949
	17 Oct 82	St. Louis, MO 102d ARCOM Bar Assn of St. Louis Clayton Facility 7777 Bonhomme Clayton, MO	Admin & Civil Law International Law	MAJ William C. Jones MAJ James F. Gravelle	COL Claude McElwee 11 York Hills Brentwood, MO 63114 Ofc: (314) 721-1900 Hm: (314) 997-7596
2.	23-24 Oct 82	Boston, MA 94th ARCOM Bldg 1606 Hauscom Field AFB, MA	Contract Law International Law	LTC (P) Daniel A. Kile CPT (P) John H. O'Dowd, Jr.	COL Neil J. Roche 55 W. Central Street Franklin, MA 02038 Ofc: (617) 528-2402 Hm: (617) 528-2783
3.	23-24 Oct 82	Philadelphia, PA 79th ARCOM MG Wurts USAR Center NAS, Willow Grove, PA 19090	Admin & Civil Law Criminal Law	CPT (P) Ward D. King, Jr. CPT (P) Joseph E. Ross	CPT Stewart M. Weintraub 267 Hendrix Street Philadelphia, PA 19116 Ofc: (215) 564-8077 Hm: (215) 677-8455
4.	30 Oct 82	Minneapolis, MN 88th ARCOM Thunderbird Motel 2201 East 70th Street Bloomington, MN 55420 (612) 854-7411	Contract Law Criminal Law	MAJ Michael J. Marchand MAJ David W. Boucher	LTC Charles Jensch 214 JAG Deatchment Bldg 201 Ft Snelling St. Paul, MN 55111

Trip	Date	City, Host Unit And Training Site	Subject	Instructors	Action Officers Address & Phone Nos.
5.	13-14 Nov 82	New York, NY 77th ARCOM US Court Complex Foley Square New York, NY 10007	International Law Admin & Civil Law	MAJ David R. Dowell MAJ Calvin M. Lederer	COL Charles E. Padgett 216 Demott Avenue Rockville Centre, NY 11570 Ofc: (212) 264-8582
6.	20 Nov 82	Detroit, MI 123d ARCOM POXON USAR Center 26402 West 11 Mile Road Southfield, MI 48034	Contract Law International Law	MAJ Paul C. Smith MAJ Sanford W. Faulkner	LTC John F. Potvin 106th JA Detachment 26402 West 11 Mile Road Southfield, MI 48034 Ofc: (313) 465-7000 Hm: (313) 881-4817
	21 Nov 82	Indianapolis, IN 123d ARCOM USAR Center, Ft Harrison Indianapolis, IN	Contract Law International Law	MAJ Paul C. Smith MAJ Sanford W. Faulkner	MAJ James F. Gatz 136th JA Detachment P.O. Box 16501 Ft. Ben Harrison, IN 46216 Ofc: (317) 547-6375 Hm: (317) 269-7415
7.	4 Dec 82	Dallas, TX 90th ARCOM Muchert USAR Center 10031 E. Northwest Highway Dallas, TX 75238	Criminal Law Admin & Civil Law	MAJ Larry R. Dean MAJ Harlan M. Heffelfinger	MAJ Richard B. Tanner 1211 Horizon Richardson, TX 75081 Ofc: (214) 748-1708 Hm: (214) 231-8920
	5 Dec 82	Houston, TX 90th ARCOM South Texas College of Law 1220 Polk San Jacinto, Houston, TX	Criminal Law Admin & Civil Law	MAJ Larry R. Dean MAJ Harlan M. Heffelfinger	MAJ Michael J. Thibodeaux 904 English Street Houston, TX 77009 Hm: (713) 695-4770 Ofc: (713) 529-0033
8.	12 Dec 82	Pittsburgh, PA 98th ARCOM Hay USAR Center 950 Saw Mill Run Blvd Pittsburgh, PA	Criminal Law Admin & Civil Law	CPT Michael C. Chapman MAJ David W. Wagner	CPT Earnest B. Orsatti 219 Fort Pitt Road Pittsburgh, PA 15222 Ofc: (412) 281-3850 Hm: (412) 367-1027
9.	22-23 Jan 83	Birmingham, AL 121st ARCOM USAR Center 142 West Valley Avenue Birmingham, AL 35209	Criminal Law Admin & Civil Law	MAJ Craig S. Schwender MAJ Ward D. King, Jr.	LTC John F. Wood 2200 Baxter Circle Vestavia Hills, AL 35216 Ofc: (205) 939-0033 Hm: (205) 823-1950
10.	5 Feb 83	Seattle, WA 124th ARCOM Leisy Hall Ft Lawton, WA 98199	Criminal Law Admin & Civil Law	MAJ Stephen D. Smith MAJ John F. Joyce	COL Thomas J. Kraft 1012 Seattle Tower Seattle, WA 98101 Ofc: (206) 624-8822 Hm: (206) 746-6405
	5-6 Feb 83	San Francisco, CA 5th MLC Hastings Law School San Francisco, CA	Criminal Law Admin & Civil Law International Law	MAJ Stephen D. Smith MAJ John F. Joyce MAJ David R. Dowell	COL Joseph W. Cotchett 4 West Fourth Avenue San Mateo, CA 94402 Ofc: (415) 342-9000 Hm: (415) 348-5328

Trip	Date	City, Host Unit And Training Site	Subject	Instructors	Action Officers Address & Phone Nos.
	8 Feb 83	Honolulu, HI HQ IX Corps (Aug) Bruyars Quadrangle 302 Maluhia Road Fort DeRussy Honolulu, HI 96815	Criminal Law Admin & Civil Law	MAJ Stephen D. Smith MAJ John F. Joyce	CPT Coral Pietsch P.O. Box 25065 Honolulu, HI 96825 Ofc: (808) 548-4765
11.	26-27 Feb 83	Denver, CO 96th ARCOM Quade Hall Fitzsimmons AMC Denver, CO 80240	Admin & Civil Law Contract Law	MAJ Robert E. Hilton, USMC MAJ Julius Rothlein	LTC Steven P. Kinney II 1718 Gaylord Street Denver, CO 80206 Ofc: (303) 320-1005 Hm: (303) 422-4637
12.	5-6 Mar 83	Columbia, SC 120th ARCOM School of Law University of South Carolina Columbia, SC	Criminal Law Contract Law	CPT Michael C. Chapman MAJ Paul C. Smith	COL Osborne E. Powell, Jr. 1220 Otter Trail West Columbia, SC 29169 Ofc: (803) 765-5567 Hm: (803) 791-4078
13.	12 Mar 83	San Antonio, TX 90th ARCOM USAR Center 1920 Harry Wurzbach Highway San Antonio, TX 78209	Admin & Civil Law Criminal Law	MAJ Philip F. Koren MAJ Glen D. Lause	MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 349-3761
14.	12-13 Mar 83	Orlando, FL 81st ARCOM Orlando Hyatt Hotel Orlando, FL	International Law Contract Law	MAJ H. Wayne Elliott MAJ Michael J. Marchand	COL James E. Baker 5260 Redfield Court Dunwoody, GA 30338 Ofc: (404) 221-6455 Hm: (404) 394-6384
	14 Mar 83	Puerto Rico Conference Room HQ PR ARNG San Juan, PR	International Law Contract Law	MAJ H. Wayne Elliott MAJ Michael J. Marchand	LTC Otto Riefkohl P.O. Box 949 Old San Juan Station San Juan, PR 00902 (809) 753-4899
15.	19-20 Mar 83	Los Angeles CA 63d ARCOM Los Alamitos AFRTC Los Angeles, CA	Admin & Civil Law Criminal Law	MAJ Mark A. Steinbeck MAJ Alan K. Hahn	MAJ John C. Spense 1535 Bellwood Road San Marino, CA 91108 Ofc: (213) 974-3763 Hm: (213) 285-4107
16.	26 Mar 83	Kansas City, MO 89th ARCOM Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law	LTC John C. Cruden LTC William P. Greene	LTC Loren J. Taylor 2332 North 88th Street Kansas City, Kansas Ofc: (913) 371-2000 Hm: (913) 299-0042
17.	26 Mar 83	New Orleans, LA 2d MLC USAR Center 5010 Leroy Johnson Drive New Orleans, LA 70146	Contract Law International Law	MAJ James O. Murrell MAJ John H. O'Dowd, Jr.	CPT Bruce Shreeves One Shell Square, 43d Floor New Orleans, LA 70139 Ofc: (504) 522-3030 Hm: (504) 283-8629

Trip	Date	City, Host Unit And Training Site	Subject	Instructors	Action Officers Address & Phone Nos.
	27 Mar 83	Tulsa, OK 2d MLC Reese USAR Center 4000 East 15th Street Tulsa, OK	Contract Law International Law	MAJ James O. Murrell MAJ John H. O'Dowd, Jr.	MAJ William G. LaSorsa 1591 Swann Drive Tulsa, OK 74120 Ofc: (918) 583-2624 Hm: (918) 585-9320
18.	16-17 Apr 83	Columbus, OH 83d ARCOM Conference Room Bldg 306 Defense Construction Supply Center Columbus, OH	Admin & Civil Law Criminal Law	LTC John C. Cruden LTC William P. Greene	COL Nicholas B. Wilson P.O. Box 16515, DCSC Columbus, OH 43216 Ofc: (614) 236-3702
19.	23-24 Apr 83	Chicago, IL 86th ARCOM ARR Conference Room FT Sheridan, IL	Admin & Civil Law International Law	MAJ Michael E. Schneider MAJ Sanford W. Faulkner	CPT Mark Lukoff 8770 N. Pelharm Parkway Bayside, Wisconsin 53217 Ofc: (414) 224-4805 Hm: (414) 351-0113
20.	30 Apr 83	Washington, D.C. 97th ARCOM 1st U.S. Army Conference Center Fort Meade, MD	International Law Criminal Law	MAJ James F. Gravelle MAJ Glen D. Lause	LTC Charles Brookhart 4218 Shannon Hill Alexandria, VA 22310 Ofc: (202) 633-3564 Hm: (703) 960-6344

Criminal Law News

Criminal Law Division, OTJAG

Presidential Pardons

Under the Constitution, the President has the power to grant pardons for federal offenses. After the expiration of three years from release from confinement, application may be made for the highest form of clemency available, the Presidential Pardon. The pardon signifies forgiveness of an offense. However, it will not change the nature of a discharge or expunge a record of conviction. As a general proposition, a pardon by the President relieves the recipient of legal disabilities attached to the conviction by reason of federal law. Whether or not an offender has lost any state civil rights as a consequence of a federal conviction depends upon the laws of the state in which he or she resides or attempts to exercise such rights. In some instances, state authorities restore such rights without a Presidential Pardon.

The basis on which a pardon is usually granted is the demonstrated good conduct of the petitioner for a certain period of time after his or her release from confinement. Among the factors considered are his or her subsequent arrest record, financial and family responsibilities, and reputation in the community. These and other relevant considerations are carefully reviewed to determine whether the petitioner has become and is likely to continue to be a responsible, law-abiding person. An information packet concerning a petition for Presidential Pardon may be obtained from the Pardon Attorney, United States Department of Justice, Office of the Pardon Attorney, Washington, D.C. 20315.

FROM THE DESK OF THE SERGEANT MAJOR

By Sergeant Major John Nolan



1. Summer Attrition.

Many offices suffer temporary personnel shortages during the summer months due to personnel assignment rotation and leave. Some of our chief clerks plan for and absorb this shortage while others wait until the last moment before taking any positive action. There are many ways to resolve the summer turnover dilemma without panicking.

We must first realize that no office will have 100 percent of its authorized strength all the time. Therefore, nonessential positions should be staffed with temporary personnel or left vacant. Secondly, reservists, summer interns, summer hires, or on-the-job training personnel should be used.

Many supervisors take the easy way out by complaining and making excuses. Experience has shown, however, that if the five P's—Prior Planning Prevents Poor Performance—are observed, the office we will always be one step ahead. Many complain that individuals are not being good clerks or court reporters, that offices are receiving inexperienced personnel, and that the Basic Legal Clerk Course at Fort Benjamin Harrison and the Naval Justice School should do a better job. It should be apparent, however, that personnel arriving on initial assignments are not going to be perfect legal clerks or court reporters; it is the supervisor's responsibility to train them to become qualified clerks and court reporters. Some are not satisfied by the performances of experienced clerks. An examination of the MILPERCEN file of the subject of the complaints contradicts the claims, containing, for example, maximum SEERs and letters of appreciation, from the individual doing the complaining. Personalities should not interfere with getting the job done. Some of us need to reassess the situation, work with the resources available, and stop making excuses.

2. Promotions.

Enlisted personnel frequently ask, "Why can't I get promoted? The cutoff scores are too high. I am thinking about changing my MOS and going into a field where I can get promoted." Many articles, messages, ARs, and the like have been distributed regarding this subject. However, it appears that many of our people are hurting their chances of being promoted by overlooking some simple basic requirements. One of the first items that show up on the microfiche reader screen during the selection board deliberations is the full-length photograph. If the photograph looks bad, the service-member is off to a poor start. If the soldier is overweight, the photograph will show it and put a negative image on the rest of the file. That photograph represents the candidate before the board. You should look like a soldier if you expect to be promoted. Article 15s, letters of reprimand, courts-martial, etc. are not helpful either. It is very important to check the microfiche and to make any necessary corrections. Do not wait for the local MILPO to do it for you.

Everyone would like to be promoted for doing good work; however, some expect to be promoted without qualifying. There are others who are qualified but must wait for the promotion scores to be lowered. Whatever the case may be, it is important to always be prepared to qualify for and assume the duties of the next higher grade.

3. Advanced Course.

Congratulations to all 53 individuals who have been selected to attend the 1983 ANCOG.

4. Continuing Education.

The Third Annual Legal Clerks and Court Reporters Workshop has had a name change. This annual event for our junior clerks is now called the

"Refresher Training Course for 71D10-30 and 71E10-30." It is scheduled for 13-16 March 1983 at Fort Monroe, Virginia. Letters of Instruction have already been sent to all MACOMs. If your office has not received an LOI by 30 November 1982, contact SFC Judge (680-4363). The objective of this refresher course is to provide legal

clerks and court reporters with current information and instruction in military justice, changes to the Manual for Courts-Martial and Army Regulation 27-10, records of trial, convening, promulgating, supplementary, and final orders, appeals, claims, legal assistance, new equipment, and educational opportunities.

CLE News

1. Alabama State Bar Members—Mandatory Continuing Legal Education

Commencing 1 January 1982, all members of the Alabama State Bar who are not specifically exempt must attend 12 hours of approved continuing legal education each calendar year. Active duty members of the Armed Forces are exempt. Credits or exemptions claimed must be reported each year by 31 December. Forms for reporting were mailed to members of the Bar in September 1982. Those who have not received forms or have additional questions should write:

Mary Lynn Pike
Staff Director
MCLE Commission
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101

Reserve component officers are not exempt. All TJAGSA continuing legal education courses have been approved by the Alabama State Bar.

2. Montana State Bar Members—Continuing Legal Education

Effective 1 January 1983, all active members of the Montana State Bar must attend 15 hours of approved continuing legal education. Approved courses taken since 1 September 1982 will qualify for credit in year 1983. TJAGSA has applied for an approved sponsor status for TJAGSA continuing legal education courses.

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are

not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative yearly indices are provided users. TJAGSA publications may be identified for ordering purposes through these. Also, recently published titles and the identification numbers necessary to order them will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER TITLE

AD B063185 Criminal Law, Procedure,
Pretrial Process/JAGS-
ADC-81-1

AD B063186 Criminal Law, Procedure,
Trial/JAGS-ADC-81-2

AD B063187 Criminal Law, Procedure,
Posttrial/JAGS-ADC-81-3

AD B063188 Criminal Law, Crimes &
Defenses/JAGS-ADC-81-4

AD B063189 Criminal Law, Evidence/
JAGS-ADC-81-5

AD B063190 Criminal Law, Constitutional
Evidence/JAGS-ADC-81-6

AD B064933 Contract Law, Contract Law
Deskbook/JAGS-ADK-82-1

AD B064947 Contract Law, Fiscal Law
Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

4. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

5. TJAGSA CLE Course Schedule

November 1-5: 21st Law of War Workshop (5F-F42).

November 2-5: 15th Fiscal Law (5F-F12).

November 15-19: 22d Federal Labor Relations (5F-F22).

November 29-December 3: 11th Legal Assistance (5F-F23).

December 6-17: 94th Contract Attorneys (5F-F10).

January 6-8: Army National Guard Mobilization Legal Planning Course.

January 10-14: 1983 Contract Law Symposium (5F-F11).

January 10-14: 4th Administrative Law for Military Installations (Phase I) (5F-F24).

January 17-21: 4th Administrative Law for Military Installations (Phase II) (5F-F24).

January 17-21: 69th Senior Officer Legal Orientation (5F-F1).

January 24-28: 23d Federal Labor Relations (5F-F22).

January 24-April 1: 100th Basic Course (5-27-C20).

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16-20: 12th Methods of Instruction.

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 97th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 15-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

6. Civilian Sponsored CLE Courses

January

3-12: MCLNEL, Evidence, Boston, MA.

10-14: UMLC, Estate Planning, Miami Beach, FL.

11-2/3: MCLNEL, Real Estate Financing, Cambridge, MA.

13-15: GICLE, Bridge-the-Gap Seminar, Atlanta, GA.

14: OLCI, Basic Tax, Cleveland, OH.

17-26: MCLNEL, Estate Planning, Cambridge, MA.

18: OLCI, Basic Tax, Dayton, OH.

18-27: MCLNEL, Securities Law, Cambridge, MA.

19-21: FJC, Workshop for Judges of the Ninth Circuit, Tempe, AZ.

20-22: ALIABA, Civil Practice/Litigation in Federal/State Courts, New Orleans, LA.

21: GICLE, Agricultural Law, Tifton, GA.

21: OLCI, Basic Tax, Cincinnati, OH.

21-22: KCLE, Kentucky Municipal Law, Lexington, KY.

21-22: LSU, Recent Developments in Legislation & Jurisprudence, New Orleans, LA.

25: OLCI, Basic Tax, Canton, OH.

26-28: FJC, Workshop for Judges of the Eighth & Tenth Circuits, Phoenix, AZ.

28: GICLE, Agricultural Law, Savannah, GA.

28: OLCI, Basic Tax, Columbus, OH.

28: GICLE, Real Estate Practice & Procedure, Albany, GA.

30-31: ALIABA, Advanced Taxation of Income of Trusts & Estates, New York, NY.

31-2/28: MCLNEL, Tax Skills, Boston, MA.

February

4: GICLE, Real Estate Practice & Procedure, Macon, GA.

4-5: GICLE, Trial Evidence, Savannah, GA.

10: MCLNEL, Financing the Growing Business, Boston, MA.

11: OLCI, Federal Taxation Conference, Dayton, OH.

11: GICLE, Real Estate Practice & Procedure, Atlanta, GA.

11-12: GICLE, Trial Evidence, Atlanta, GA.

12: MCLNEL, Advocacy, Boston, MA.

18: OLCI, Federal Taxation Conference, Canton, OH.

18-19: GICLE, Estate Planning Institute, Athens, GA.

18-19: GICLE, Family Law, Macon, GA.

21-25: ALIABA, Basic Estate & Gift Taxation, Scottsdale, AZ.

24-27: ATLA, Developing the Case, Miami Beach, FL.

25: OLCI, Federal Taxation Conference, Columbus, OH.

25-26: GICLE, Family Law, Savannah, GA.

25-26: KCLE, Securities Law, Lexington, KY.

26: MCLNEL, Will & Trust Drafting, Cambridge, MA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

- NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.
- NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.
- OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.
- PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.
- PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.
- PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.
- SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.
- SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.
- SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.
- SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.
- SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.
- SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.
- TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.
- UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.
- UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.
- UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.
- VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.
- VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations, Pamphlets.

<i>Number</i>	<i>Title</i>	<i>Change Date</i>
AR 10-1	Organizations and Functions—Functions of the Department of Defense and its Major Components. (Supersedes AR 10-1, 6 Jan 77)	15 Jul 82
AR 10-1	Organizations and Functions—Functions of the Department of Defense and its Major Components	C1 15 Jul 82
AR 27-20	Legal Services—Claims	I01 3 Sep 82
AR 135-133	Army National Guard and Army Reserve—Ready Reserve Screening Qualification Records System and Change of Address Reports	C6 15 Aug 82
AR 340-21-1	The Army Privacy Program: System Notices and Exemption Rules of Housekeeping Functions (Supersedes AR 340-21-1, 4 Feb 77)	15 May 82
AR 600-25	Salutes, Honors, and Visits of Courtesy.	I01 30 Jul 82

AR 600-29	Personnel—General, Fund-Raising Within the Department of the Army	I01	12 Aug 82
AR 600-50	Standards of Conduct for Department of Army Personnel. (Supersedes AR 600-50, 20 Oct 77)		15 Aug 82
AR 600-200	Enlisted Personnel Management System	I10	23 Jul 82
AR 601-50	Appointment of Temporary Officers in the Army of the United States Upon Mobilization		1 Aug 82
AR 635-40	Physical Evaluation for Retention, Retirement or Separation	C1	1 Aug 82
AR 635-100	Officer Personnel	C27	1 Aug 82
AR 735-11	Accounting for Lost, Damaged, and Destroyed Property	I02	26 Jul 82
DA Pam 550-158	Area Handbook for Czechoslovakia. (Supersedes DA Pam 550-158, Sep 71)		Apr 81

Articles

- Ayers, *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 N.E. L. Rev. 643 (1981-82).
- Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 Emory L.J. 1065 (1981).
- Blank, *Problem Areas in Will Drafting Under New York Law*, 56 St. John's L. Rev. 459 (1982).
- Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70 (1982).
- George, *United States Supreme Court 1980-1981 Term: Criminal Law Decisions*, 27 N.Y.L. Sch. L. Rev. 1 (1981).
- Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 Minn. L. Rev. 567 (1982).
- Moss, *The Sweeping-Claims Exception and the Federal Rules of Evidence*, 1982 Duke L.J. 61.
- Parker, *The Rights of the Child Witness: Is the Court a Protector or Perpetrator?*, 17 N.E. L. Rev. 643 (1981-82).
- Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175 (1981).
- Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297 (1982).
- Schleuter, *Court-martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. Crim. L. & Criminology 74 (1982).
- Schmalz, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 Vand. L. Rev. 409 (1982).
- Unruh & Nodgaard, *Suppression of In-Court Identification Testimony on the Basis of a Fourth Amendment Violation*, 21 Washburn L.J. 219 (1982).
- Comment, *Federal Sector Strike Injunctions: Who May Request Them and Where?*, 31 Am. U.L. Rev. 681 (1982).
- Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 Vill. L. Rev. 351 (1982).
- Comment, *Constitutional Law: Evaluating the Constitutionality of the Model Drug Paraphernalia Act*, 21 Washburn L.J. 393 (1982).
- Comment, *Constitutional Law: Seized in His Own Castle*, 21 Washburn L.J. 405 (1982).
- Comment, *Criminal Law: The Accused's Right to Miranda Warnings—or Their Functional Equivalent*, 21 Washburn L.J. 427 (1982).

Note, *Chart Summaries: Jury Aids or Evidence*, 34 Baylor L. Rev. 168 (1982).

Note, *Telescopes, Binoculars, and the Fourth Amendment*, 67 Cornell L.J. 379 (1982).

Note, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"* 56 St. John's L. Rev. 459 (1982).

Note, *Nonjudicial Punishment Under Art. 15 of the UCMJ: Congressional Precept and Military Practice*, 19 San Diego L. Rev. 839 (1982).

Note, *Military Reservist-Employees' Rights Under 38 U.S.C. § 2021(b)(3)—What is an Incident or Advantage of Employment?*, 19 San Diego L. Rev. 877 (1982).

Note, *Mistrials Arising from Prosecutorial Error: Double Jeopardy Protection*, 34 Stan. L. Rev. 1061 (1982).

Note, *Hypnosis: Should Hypnotically Induced Testimony Be Excluded?*, 21 Washburn L.J. 607 (1982).

Note, *Criminal Responsibility: Changes in the Insanity Defense and the "Guilty But Mentally Ill" Response*, 21 Washburn L.J. 515 (1982).

Recent Developments, *Criminal Procedure—Exclusionary Rule—The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable, Good Faith Belief that His Actions Were Legal*. United States v. Williams (5th Cir. 1980), 27 Vill. L. Rev. 211 (1981).

By Order of the Secretary of the Army:

Official:

ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

E. C. MEYER
General, United States Army
Chief of Staff



